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PRACTICE REPORTS

IN THE

S U P R E M E C O U R T

AND

COURT OF APPEALS,

OF THE

STATE OF NEW YORK.

BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW YORK.

VOLUME XLIV.

ALBANY:
WILLIAM GOULD & SONS,
LAW BOOKSELLERS AND PUBLISHERS.
1872.

Entered according to act of Congress, in the year eighteen hundred and seventy-two

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Rec. July 31, 1873

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PRACTICE REPORTS.

SUPREME COURT.

JAMES LAMENT, Survivor, &c., Respondents, agt. ISAAC T. HAIGHT and others, &c., Appellants.

Where a *highway commissioner* has received notice of the unsafe character of a *bridge* in his town, a year before an alleged injury has been sustained by reason of its defects, and has negligently omitted to cause it to be repaired, such commissioner is guilty of a wrong rendering him liable for all its consequences to those who might be injured by it.

It is the commissioner's wrong exclusively, and not that of his successors in office, and he may be sued for it as a mere individual, relying upon his official obligation to establish the duty he has violated.

Such a case is, therefore, not one where the action could be *continued against his successor in office*.

If the requisite notice has been given the commissioner, and he has funds, or could by reasonable official diligence have procured them, or without them could have caused the bridge to be repaired on the credit of the town, he is bound to have the repairs made, and a failure to do so, resulting in an injury to another, will render him liable to an action.

But the commissioner is not bound to make use of his own personal exertions to repair the bridge himself, or so far guard it by means of admonitions to the persons using it, as would inform them of its condition in order to protect himself against liability for injuries which might be otherwise occasioned.

General term, third department.

September, 1872.

Before DANIELS, PARKER and PLATT POTTER, JJ.

THIS is an appeal from a judgment recovered upon a verdict and from an order denying a motion for a new trial, made upon the minutes of the justice holding the circuit.

Lament agt, Haight.

GAUL & ESSELSTYN *for Appellants.*BEALE & BENTON and ANDREWS *for Respondent.*

DANIELS, J. This action was brought originally against Bernice B. Smith, as commissioner of highways, of the town of New Lebanon, and it has since been continued against his successors in office. The demand made by the plaintiff was for damages occasioned to a horse by reason of an injury created by passing his leg down a hole in a defective bridge, on one of the public highways of the town. It was claimed that the highway commissioner had received notice of the unsafe character of the bridge, the year before the injury was sustained, and that he had negligently omitted to cause it to be repaired.

If such was the fact, as the evidence tended to prove it was, then the delinquent commissioner was guilty of a wrong, rendering him liable for all its consequences to those who might be injured by means of it. It was his wrong exclusively, and not that of his successors in office, and he might have been sued for it as a mere individual, relying upon his official obligation to establish the duty he had violated. It was not a case, therefore, where the action could be continued against his successor in office, for that right is limited to those cases when a contract has been entered into, or a liability may have been incurred, in behalf of the town, within the scope of the officer's authority. (3 *R. S. 5th ed.*, 775, § 111.)

If the liability relied upon, existed at all, it was not incurred on behalf of the town by the commissioner, neither was it within the scope of his authority, for no authority was any where conferred upon him to involve the town in liability, on account of his negligent omission of duty.

Such liability would invert the established principle of law, requiring a subordinate wrong-doer to indemnify his superior against the consequences of his wrong. The case

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was not one, therefore, which could be continued against his successors in office, and in that manner made a charge upon the town whose officer he was. It is only where the contract has been made, or the liability has been incurred within the scope of the officer's authority, that such a consequence was designed to follow. And in those cases it would be entirely just and proper.

But to apply to the protection of a public officer for the purpose of indemnifying him against the result of the violation of a plain statutory duty, would be directly injurious to all public and private interests, dependent upon the faithful discharge of his official obligations, and it would operate as a direct encouragement to official delinquency since it would protect the negligent wrong-doer from all the legal consequences of his wrong. That, certainly, could not have been designed by the authority enacting the law. The policy of the law, on the contrary, is to require, as well as induce, public officers for their own protection, faithfully to discharge the duties and obligations imposed upon them, and experience demonstrates the necessity of rendering this policy as stringent as circumstances may indicate to be practicable.

The evidence given upon the trial tended very strongly to show that the commissioner had notice of the defective condition of the bridge in the year 1863, while the injury complained of did not occur until June, 1864. If the jury believed that he had notice at that time, then by availing himself of the power given him by statute he could have secured the funds required to repair the bridge, and had the repairs made before the time when the injury happened. For the statute made it his imperative duty to deliver to the supervisor of his town, a statement of the improvements necessary to be made on the roads and bridges of the town, together with the probable expense thereof, and that, it required the Supervisor to lay before the Board of Supervisors at their next meeting, and the Board was then to

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cause the amount to be assessed upon and collected in the town, (*3d R. S. 5th ed.* 382, § 4.) If the amount prescribed by this section would in his opinion prove insufficient he was empowered to apply in open town meeting for a vote increasing its amount. But no reason exists for supposing that the amount, within the absolute power of the commissioner, would have proved insufficient, for that gives him the right to require one hundred dollars more than the board provided should be raised, which would have been more than sufficient to repair this bridge.

The commissioner had complete authority for procuring all the money required to put the bridge in a safe and proper condition, and if he had the notice, which the evidence tended to establish, in time to enable him to bring the subject before the supervisors, he violated his duty in omitting to do so, and he cannot rely upon that violation as a shield to protect himself from liability in this case. If he did not have the means to make the repairs, assuming he had the previous notice, it was his own fault, of which he cannot take the advantage (*Robinson agt. Chamberlain*, 34 N. Y., 389, 395 ; *Hover agt. Barkhoof*, 44 N. Y., 113).

In the last case the defendants were held liable on the exclusive ground that they had the power under a special act of the legislature to borrow the money to repair the bridge, and omitted to exercise it.

This bridge had become damaged by use, and with the consent of the town auditors it might have been repaired upon the credit of the town (*2d R. S.; 5th Ed.* 44, § 179, 180.) and it was the commissioner's duty to have endeavored to have the repairs made under that authority if for any reason the omission of the duty imposed by the other provision could have been excused. For although the language of the section last referred to is simply permissive, as it related to a duty which the public interests and the safety of its members required to be performed, it was in legal effect peremptory in its nature. (*Hutson agt. Mayor, &c.*, 5 Seld.

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163.) It is no answer to the omission to perform this duty, that the town auditors might have withheld their consent, for that would have been a violation of their official duties if the safety of the public required the bridge to be repaired, and that, it is not to be presumed they would have been guilty of. The obligation was in plain terms imposed upon the commissioner to cause the bridges over streams intersecting highways to be kept in repair, and it was his duty to avail himself of the means the law placed at his command to secure that end (*2d. R. S., 5th ed., 381, § 1, sub. 4*) and if by neglecting to do so, the plaintiff's property was injured, the commissioner ought to be held liable for the consequences.

If the notice was given him, and he had funds, or could by reasonable official diligence have procured them, or, without them, could have caused the bridge to be repaired on the credit of the town, he was bound to have the repairs made, and a failure to do so, resulting in an injury to another; would render him liable to an action.

But this case was not submitted to the jury under that principle. The court went further, and held that the commissioner would be liable if the bridge might have been repaired by a little personal labor and superintendence on the part of the officer, even though he had no funds, or the means of procuring them for the purpose of causing that to be done.

In effect, that he was bound to make use of his own personal exertions to repair the bridge himself, or so far guard it by means of admonitions to the persons using it as would inform them of its condition in order to protect himself against liability for injuries which might be otherwise occasioned. This was the substance of the proposition on this part of the case as it was submitted to the jury. No authority can be found so far extending the liability of the commissioner. And as his duties are prescribed by the statutes of the state, and this is not found among them, this portion of the charge gave the jury an erroneous view of the law applicable to the case. For this reason, as well as the

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substitution of the defaulting commissioner's successors in office, a new trial should be ordered. The judgment and the order denying a new trial should be set aside, and a new trial ordered after vacating the orders substituting the successors in office of the commissioner originally made the defendant, with costs to abide the event.

Kenny agt. Hinds.

COURT OF APPEALS.

PETER D. KENNY, respondent, agt. ADIN I. HINDS, appellant.

An action was brought in this case by the assignee upon a paper, of which a copy is as follows: "Rochester, February 28, 1861, Please pay to Jacob Hinds or order, \$400, from the proceeds of Leonard & Ives' bond, and charge the same to the account of, yours, &c., ADIN J. HINDS. To CHAS. H. STEWART, Esq., Counsellor, &c., New York." "Accepted, payable as soon as this amount is collected, accruing to drawer. CHAS. H. STEWART." Indorsed upon its face, "JACOB HINDS." *Held*, that this paper was not a draft, nor was it negotiable. No title to it, or any indebtedness for which it may have been given, passed to the assignee by the mere indorsement of it. By its express terms it was made payable from an anticipated, specific fund, not then in existence, and its future existence contingent. As the indorsement to the plaintiff was all which he showed as proof of his ownership of it, and of any claim against the defendant, he failed to make out a case.

February 1871.

THIS was an action brought to recover upon an instrument in writing as follows: "Rochester, February 28, 1861, Please pay to Jacob Hinds or order \$400, from the proceeds of Leonard & Ives bond, and charge the same to the account of, yours, &c., ADIN J. HINDS. To CHARLES H. STEWART, Esq., Counsellor, &c., New York." Indorsed "JACOB HINDS." Indorsed also as follows: "Accepted, payable as soon as this amount is collected accruing to drawer, CHAS. H. STEWART."

The action was tried before Justice E. DARWIN SMITH, at the New York circuit in November, 1867, and a verdict rendered for the plaintiff. The defendant appealed to the general term of the supreme court and, on argument, the judgment was affirmed at the June term, 1869, Justice CLERKE delivering the opinion of the court.

The defendant appealed to the court of appeals.

Kenny agt. Hinda.

GEORGE MILLER, *for appellant.*

T. C. CRONIN, *for respondent.*

FOLGER, J.—To sustain the conclusion of law in favor of the plaintiff, made by the judge at special term, it needed that he find, in the plaintiff's favor, two questions of fact.

1st. That the defendant was indebted to Jacob Hinds at the time the instrument in writing was made and delivered in the amount expressed therein.

2d. That Jacob Hinds assigned to the plaintiff, the instrument in writing, and indebtedness, if any there was, for which it was given.

The learned judge did find these two facts. But if it should appear that he found them without there being any evidence to sustain them, or either of them, there was error.

The first of these findings of fact may, perhaps, be based upon the allegations of the pleadings.

The complaint avers that the defendant was indebted to Jacob Hinds at the time of the making of the writing in the sum named in it.

The answer does not with entire explicitness deny this averment.

As we shall hold that there is no evidence to sustain the other finding of fact, it is not important that we decide whether the allegations of the pleadings will sustain this.

The second of these findings of fact, is entirely without evidence to sustain it. It was put by the learned judge at special term, upon the instrument in writing and the indorsement of it to the plaintiff. There is nothing else in the case upon which it could have been put; were the instrument made by the defendant a draft or bill of exchange, we should acquiesce in the finding. But it is not.

It is, by its express terms, payable from an anticipated specific fund, not then in existence, and its future existence contingent.

It expresses no consideration. It was so accepted that the

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payment of it, by the one to whom it was addressed, depended upon the future collection of the amount for the drawer.

Such a paper is not a draft, nor is it negotiable. No title to it, or to any indebtedness for which it may have been given, passes to the assignee by the mere indorsement of it (3 *Kent's Com.*, 90 (margin. 76), note; *Edwards on Notes*, 141; *Brown agt. Richardson*, 20 N. Y., 472; 1 *Parsons on Bills, &c.*, 42, et seq.)

As the indorsement of this paper to the plaintiff was all which he showed as proof of his ownership of it and of any claim against the defendant, he failed to make out a case.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Rowe agt. Stevens.

N. Y. SUPERIOR COURT.

JAMES ROWE, plaintiff and appellant agt. SALMON S. STEVENS, defendant and respondent.

In an action to recover a *broker's commission* on a sale of real estate, upon the trial before the court and a jury, evidence was introduced by both parties, and at the close of such evidence, defendant's counsel moved to dismiss the complaint on the ground that a broker cannot take a commission from both parties, the motion was denied, and the defendant excepted.

The court, in submitting the case to the jury, charged that, under certain circumstances stated, a broker could take a commission from both parties, and left it to the jury to say whether this was such a case—the defendant did not except to the charge of the judge nor to any insufficiency of evidence. *Held*, that the defendant was concluded by the verdict of the jury against him, Not having excepted to the judge's charge nor to the insufficiency of evidence, he could not move for a new trial on the judge's minutes.

General Term, April 1872.

Before BARBOUR, Ch. J., FREEDMAN and SEDGWICK, JJ.

APPEAL from order setting aside verdict and granting a new trial.

The action was brought to recover the usual broker's commission for services rendered by plaintiff to defendant under an employment as a broker to find a purchaser for fifteen lots of land owned by defendant.

The defendant denied such employment and the rendition of any services for defendant, at defendant's request, and claimed that plaintiff was employed by other persons than the defendants, namely by Winters and Hunt, to bring about an exchange of some of their property for said lots, that he did effect such exchange, but that his services in that respect were rendered to such Winters and Hunt, who paid the plaintiff the usual broker's commission and fees therefor.

Upon the trial, before the court and a jury, evidence was

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introduced by both parties and, at the close of such evidence, defendant's counsel moved to dismiss the complaint on the ground that a broker cannot take a commission from both parties. The motion was denied and defendant excepted.

The case was submitted to the jury, under the charge of the court upon the questions of fact involved, and the jury rendered a verdict for plaintiff for \$950.

Defendant's counsel then moved the court to set aside the verdict as contrary to the evidence. The court granted the motion and made an order setting aside the verdict and ordering a new trial with costs to abide the event.

Plaintiff appeals from such order.

CHAUNCEY SHAFFER, *for plaintiff and appellant.*

IRA D. WARREN, *for defendant and respondent.*

By the court, FREEDMAN, J.—The learned judge presiding at the trial charged the jury in effect that, although as a general rule, a broker cannot act for both parties and collect a fee from each, yet there may be circumstances under which he may rightfully be employed by both parties to do a joint service upon the agreement to be paid equally by them, but that this must be fully understood.

He left it to the jury to find whether the case, according to the evidence, did or did not come within the exception referred to, and charged them that, before they could render a verdict for the plaintiff, they had to find from the evidence, as a fact, not only that defendant employed plaintiff, but also that it was understood by all the parties interested—Hunt and Winters on the one side and the defendant on the other—that plaintiff was to act as a broker for both sides and to be paid accordingly.

The defendant, who had previously and unsuccessfully moved for a dismissal of the complaint on the sole and specific ground that a broker cannot take a commission from

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both parties, did not request the court to charge otherwise and took no exception to the charge as made. Consequently he acquiesced in it and the charge, as delivered, must be assumed to embody the true rule of law applicable to defendant's case upon the present appeal by plaintiff.

The only question, then, before us is, whether the court below erred in setting aside the verdict.

The motion was made on the judge's minutes. Section 264 of the Code prescribes three distinct grounds upon which the judge, who tries the cause, may entertain such motion, namely: (1) upon exceptions; (2) for insufficient evidence, and (3) for excessive damages.

The defendant moved upon the sole ground that the verdict was contrary to evidence, and unless it was clearly so, the motion should have been denied.

Upon an examination of the proceedings had upon the trial we find that, when plaintiff rested, no motion was made by defendant for a dismissal of the complaint, for the reason that plaintiff had failed to prove a cause of action and that, at the close of the evidence on both sides, the defendant again omitted to move for such dismissal, or the direction of a verdict in his favor upon the ground of the insufficiency of the evidence to sustain a verdict against him.

The defendant, therefore, by not objecting to submit the case to the jury upon the questions of fact involved therein, conceded that there was sufficient evidence to carry the case to the jury, and he consented to a decision of these questions by that tribunal.

Having taken his chance of a favorable verdict, which would have concluded the plaintiff upon the facts, and there being a clear conflict of testimony between the parties, who had appeared as witnesses on their own behalf, the defendant should not afterwards have been permitted to allege that the verdict is without evidence or insufficiently supported by evidence, and, for that reason, against law. (*Barrett* agt. *The Third Ave. R.R. Co.*, 45 N. Y., 632.)

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Moreover, it appears that there really was sufficient evidence to authorize the jury to find as they did, and the case therefore, belongs to a class of cases in which the rule is that the court will not set aside the verdict merely because the court is of the opinion that it would have come to a contrary conclusion upon the same evidence.

The policy of the law is not only to do justice between the parties, but also to end the legal-strife after each of them has had a reasonable opportunity for the full presentation of his side of the case. The law, therefore, prescribes certain forms, according to which justice is uniformly administered, and very wisely holds that during the progress of an action certain benefits can be claimed and secured only in a certain form and at a particular stage of the proceedings, and are waived, unless so applied for. In many instances a party has his free choice, which, however, when made will bind him to abide by it with all its consequences. By electing one mode for the assertion and investigation of his rights, he is deemed to have waived others which are inconsistent therewith. If the practice were otherwise litigation would be indeterminable. According to these fundamental principles there is neither injustice nor hardship in holding a defendant, who has, either carelessly or designedly, seen fit to omit making his motion, concluded upon the facts established by the verdict of the jury.

The order appealed from should be reversed with costs.

BARBOUR, C. J., and SEDGWICK, J., concurred.

Matter of Viele.

SUPREME COURT.

In the matter of the application of TERESA VIELE, for the custody of certain children by her marriage with EGBERT L. VIELE.

When children are in the custody of their father, and are brought by him into court, in obedience to a writ of *habeas corpus*, sued out by the mother, he thereby surrenders them to the custody of the court as *parens patriæ*, pending the litigation. And when the father and mother thereafter stipulate and consent that the writ be dismissed, it is proper that the order of the court entered upon that consent should not only direct that the writ be dismissed, but should dispense with the longer attendance of the children in court, by remanding them to the custody of the father, with whom the court found them, and also is *prima facie* entitled to them, although a neglect to add such an express provision to the order of dismissal of the writ is not *necessary* for the purpose of rehabilitating the respondent with parental authority, when the relator abandons the attempt to change the custody of the children to herself.

If the mother afterwards improperly obtains possession of one of the children, and flees with it to a foreign country, she thereby renounces her right of applying to the court for any relief in the premises.

New York Special Term, at chambers, October 2, 1872.

MOTION by the relator to strike out a portion of the order entered herein on the 22d of March, 1872. The order is in these words: "Before reading and filing the annexed consent, and on motion of E. S. Caldwell, attorney for the respondent, Egbert L. Viele, it is ordered that the writ of *habeas corpus*, granted herein by the Hon. DANIEL P. INGRAHAM, on the 28th day of September, 1870, be and the same is hereby dismissed. And it is further ordered that the children named in the said writ, viz: Kathalyne, Herman, Teresa, Egbert L., Jr., and Emily Viele, are and each of them is hereby remanded to the custody of their father, Egbert L. Viele, the respondent."

The consent referred to is in these words: "We hereby

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consent that the above entitled matter be discontinued, and that the writ herein be dismissed, and that an order to that effect be entered herein," which was signed by the attorneys for the parties respectively.

The court was now applied to, to strike out all that part of the order following the word "dismissed," upon the ground that it was inserted without authority, and irregularly. The affidavit used in opposing the motion alleged, among other things, that the relator had, a short time before making this motion, violently abducted one of the children from the father's house, in this state, and had fled with it to Europe, whither she had already improperly taken another of them, who had been allowed by the father to remain with her until it should be old enough to elect with which of the parents to reside permanently.

WILLIAM FULLERTON, *for the motion.*

BURTON N. HARRISON, *in opposition.*

By the court, LEONARD, J.—Mrs. Viele obtained a writ of *habeas corpus*, requiring her husband to produce their children in court, claiming the custody of them. Pursuant to the writ, the children were produced, and much testimony was taken, bearing upon the question of their custody. The parties finally agreed to dismiss the proceedings so instituted, and a consent to that effect was signed by their attorneys. An order was presented to one of the justices of the supreme court, in the city of New York, where the said proceeding was pending, reciting the said consent, and directing not only that the proceeding should be dismissed, but also containing an additional provision, not contained in the said consent, further directing that the children named in the writ should be remanded to the custody of the father, the respondent.

It is insisted that the latter part of the order is irregular, because not embraced in the written consent, and a motion

Matter of Viele.

is now made on the part of the relator, Mrs. Viele, that such part be stricken from the order.

There are sufficient reasons why the motion should not be granted.

1st. The father was *prima facie* entitled to the custody of the children. That is the rule of the common law. They were found in his custody. He was required to bring them into court, and, pursuant to its command, he produced them. Nothing appears tending to prove that his natural right as father was in any manner abridged. The relator, who sued out the writ, abandoned the claim which she made in that litigation, and consented that it be dismissed. It follows, as a matter of course, that the father, who had produced the children, was still entitled to their custody. The order declares nothing more than his natural right, upon the writ of *habeas corpus* being abandoned, and the proceeding dismissed.

The order does not constitute any bar to the rights of Mrs. Viele, whatever they may be, should she think proper, in the future, to assert them in this court. It clearly appears that the order is not an adjudication upon the merits, for nothing was heard or decided except upon the written consent; the rest of the order is merely a restoration of the custody of the children to the father, the court having previously assumed the control of them, pending the litigation, as *parens patriæ*. The court, by the latter part of the order, surrenders its control, and restores it to the father, whose right has been disturbed by its process.

Although the paragraph complained of was not necessary for the purpose of rehabilitating the respondent with parental authority, it was eminently proper that the persons produced under the writ should, on its dismissal, be remanded, as in criminal cases, to the custody in which they were found. This practice is invariably pursued on the dismissal of such a writ in criminal cases.

2d. It further appears that Mrs. Viele has improperly

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obtained the possession of at least one of the children, and has also the possession of another, by arrangement with her husband, and has now fled from the country, taking both of the children with her.

Whatever may be the affection of the mother, she is wrong in depriving these children of the protection of the father, of the benefit to be derived by an education in their native land, and of the social consideration belonging to his station in life. The advantages of her children should be the mother's chief consideration. She has disregarded their rights and paramount interests, as well as those of her husband. I think she has, by her conduct in improperly removing the children to a foreign country, renounced her right of applying to this court for any relief in the premises.

The motion is therefore denied.

An order to that effect was entered.

Vulte agt. Martin.

SUPREME COURT.

FREDERICK L. VULTE, *et al.*, executor, agt. W. RANDOLPH MARTIN, executor.

Where by the will of the testator, his wife becomes entitled to the whole of his estate that may remain after payment of his debts. On a settlement of the accounts of the testator's executor. The *executors* of his wife (she having died subsequently) are *necessary parties*.

On such settlement the surrogate has power to ascertain the amount of the assets that passed into the hands of the executor, and the amount paid out by him upon the debts of the testator; and upon payment over to the legatees or next of kin whatever surplus of assets that might remain in his hands, he was entitled to a decree declaring such settlement to be final, and discharging him from the trust. But such a settlement involves no question as to the state of the accounts between the estate of the legatees under the will, except so far as may be necessary to ascertain what should belong to each. In this case that inquiry cannot arise, as the wife took the whole estate, after payment of the debts.

Such a settlement involves no inquiry into the state of the accounts between the representatives of the wife and the executor of her husband, either in his character as executor or as trustee of the estate. As executor, he is charged with no duty in regard to the real estate, and his accounts as trustee under a deed of trust in the lifetime of his wife, cannot be adjusted on this final accounting, as executor or trustee. It is only when a trust is created by a last will, that the surrogate has power to settle a trustee's accounts.

Commissions can only be allowed upon receipts and disbursements of money belonging to the estate of the wife. The debt claimed by the executor against his testator cannot be allowed to him until its validity is legally established.

As to the claim of the executor to be allowed for debts of the estate, paid by him out of his own means, the only way he can be allowed for them is to treat him as assignee of such debts, in place of the original creditors.

New York, General Term, February, 1867.

Before G. G. BARNARD, P. J., D. P. INGRAHAM, and JOSEPH MULLIN, JJ.

THIS is an appeal from a decree of the surrogate of New York, made December 30th, 1865, upon the final accounting of D. R. Martin, as executor of the last will and testament of Oscar W. Sturtevant, deceased. By this decree it is

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adjudged that the appellants (as executors of Sarah A. Sturtevant, deceased) pay to Martin, out of their estate, the amount alleged to have been advanced by him, as executor, in excess of what he received in that capacity, with interest and commissions upon his advances, and fees of auditor and surrogate—in all \$5,301.53.

The appellants have had no accounting of their estate, and were parties to the proceeding only by reason of being cited to attend the final accounting of respondent, as the legal representatives of Sara A. Sturtevant, who was the devisee and residuary legatee of the personal estate of respondent's testator.

April 21st, 1855. Oscar W. Sturtevant (testator of respondent), and Sara A., his wife (testatrix of the appellants), being owners in fee of the house and lot, No. 47 Murray street, in New York, conveyed the same to said D. R. Martin. Contemporaneously, Martin delivered to Sturtevant a declaration of trust to the effect that the only object of the conveyance was to enable him (Martin) to borrow money for Sturtevant, secured by a mortgage upon the property, and that he "held the same in trust only for the use and benefit of said Oscar W. Sturtevant, his heirs," &c., and that he had no beneficial interest therein, except what might arise from the circumstance mentioned. He, thereupon, covenanted to reconvey the premises to Sturtevant whenever the mortgage should be satisfied.

On the 30th of April, 1855, Oscar W. Sturtevant died, leaving a will, wherein he devised and bequeathed all his estate, real and personal, to his wife (Sara A.) and appointed her executrix, and D. R. Martin executor. Mrs. Sturtevant never qualified, and Martin having qualified, he became sole executor. During the lifetime of O. W. Sturtevant, Martin never claimed or exercised any authority to intermeddle with the house in Murray street, or the rents thereof. After the death of O. W. Sturtevant, it was assumed by Martin that the claims of Sturtevant's creditors

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were largely in excess of his personal estate. The testator died possessed of a lot of office furniture, and some valuable law books, worth about \$500, of which the executor neglected to take possession, and a diamond ring, worth \$500, which he claims a right to keep as his own, and some other quite valuable personal property. Immediately after the death of Oscar W. Sturtevant, Martin, acting as his executor, assumed the authority, in that capacity, and without authority from Mrs. Sturtevant, or the surrogate, to lease the Murray street property, and collect the rents thereof, and pay therewith, as matter of legal right, divers debts of Sturtevant's estate, and also to retain a portion thereof towards a debt of his own. All these receipts of moneys from this real estate, he treated as belonging to him as executor of O. W. Sturtevant, deceased, and has intermingled them as inextricably with the personal estate of Oscar W. Sturtevant, as if the land had been actually devised to him as such executor, as trustee to pay debts, whereas, in fact, he took nothing under the will beyond the naked personal estate.

On the 26th day of May, 1863, Martin executed a conveyance of the house and lot, No. 147 Murray street, to Mrs. Sara A. Sturtevant.

On the 10th of January, 1865, Mrs. Sara A. Sturtevant (the testatrix of the appellants), died, leaving a will, and appointing the appellants her executors.

On the 11th of February, 1865, Martin filed his petition before the surrogate for a final accounting; thereupon his accounts were filed, mingling the rents and expenses of the Murray street property with his accounts of the personal estate of the testator, and a partial proceeding in the matter was had, which was afterwards abandoned for want of proper parties.

On the 13th of July, 1865, letters testamentary were issued to these appellants, as executors of the will of Sara A. Sturtevant, deceased.

On the 15th of July, 1865, Martin again filed his petition

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for a final accounting, and citation was issued to appellants, as "persons interested in the estate of Oscar W. Sturtevant, deceased," "to attend the final settlement of the account of the proceedings" of Martin, as executor, as aforesaid.

On the 3^d of August, 1865, the appellants appeared and filed various exceptions to the accounts of Martin, as executor, as aforesaid, both because he had not charged himself with some valuable personal property belonging to the estate of O. W. Sturtevant, deceased, and because he had included in his accounts matters relating to real estate, with which, as executor, he had nothing to do. On the same day the surrogate ordered the account referred to Thomas Lawrence, Esq., as auditor, for examination.

On the 18th of December, 1865, the auditor filed his report with the surrogate, substantially approving his accounts.

On the 13th of December, 1865, the appellants filed exceptions to this report.

On the 39th of December, 1865, the decree now appealed from was made by the surrogate, wherein he not only assumed jurisdiction to pass upon Martin's accounts concerning the real estate (both before and after the land was conveyed by deed to Mrs. Sturtevant), but he decreed that these appellants should pay Martin, as executor, the sum of \$999.62-100 interest upon moneys alleged to have been advanced by him, and about \$3,000, alleged to have been advanced by him towards payment of his own debt, and upwards of \$1,000, commissions upon the rents of the real estate aforesaid; and also \$250, fees of the auditor, and reserved the question of counsel fees.

ALBERT MATHEWS, *for appellant.*

First.—The decree of the surrogate was erroneous in directing these appellants to pay anything out, out of the estate of Sara A. Sturtevant to the respondent. The decree

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was made within six months after their appointment. They have not yet ascertained the debts or assets of their estate. They were not parties to this accounting for any such purpose. This was not a proceeding against their estate. The surrogate had no jurisdiction to make the decree against them (2 R. S. 95, §§ 70-71, and 94, § 65).

Second.—The surrogate had no authority to decree that the auditor's fees (\$250), should be paid out of the estate of Sara A. Sturtevant. The statute authorized them to be allowed only out of the estate of Oscar W. Sturtevant, deceased (2 Rev. Stat., 94, § 64).

Third.—The decree was erroneous in respect to the executor's commissions. The personal estate of Oscar W. Sturtevant was claimed to be largely insolvent. This personal estate was all that ever came to the hands of the respondent, in his capacity of executor. Obviously, any commissions upon this estate as accounted for, were trivial. The surrogate had no authority to allow \$1014 81-100 commissions to the respondent, either upon his own money, which he claims to have advanced to pay debts of deceased, or upon the rents of real estate he collected, or moneys he claims to have paid upon Mrs. Sturtevant's real estate in Barclay street, or much less, upon the moneys he claims to have advanced to pay his own alleged demand of upwards of \$5,000. Commissions were predicable only of money of the particular personal estate received and disbursed as executor (2 Rev. Stat., 93, § 58).

Fourth.—The surrogate had no jurisdiction to settle the accounts of Martin concerning his personal and unofficial dealings with Mrs. Sturtevant's real estate in Barclay street, and elsewhere, which she received as devisee of her husband. All these items relating to these matters must be expurgated from the accounts, and it is necessary the decree be reversed and the accounting referred back, with directions to omit them altogether.

I. By the deed, mortgage and declaration of trust, con-

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cerning the Barclay street property, Martin had no interest in the Barclay street lot, in any capacity. If the trust were valid, it only gave authority to execute the mortgage, and ceased when that was done (*Selden* agt. *Vermilyea*, 3 N. Y. *Rep.*, 516). But the trust was void; and in any event, the land vested in Mr. Sturtevant, and was devised to his wife by him, subject only to the mortgage (1 *Rev. Stat.*, 727-8-30, §§ 45, 47, 49, 67; *Bellinger* agt. *Schaefer*, 2 *Sand Ch.* 293; *Rawson* agt. *Lampman*, 5 N. Y. (1 *Seld.*) 460).

II. This accounting of rents of real estate, is *coram non judice*, and void, and benefits nobody, and settles nothing. The dealings between Mrs. Sturtevant and Mr. Martin concerning the real estate, whether resulting from a fraudulent assumption of authority, or an ignorant mistake, were clearly immaterial upon an accounting of Martin as executor of Oscar W. Sturtevant under the will, which limited his power and authority to the personal estate of his testator. It is immaterial that he paid debts of his testator, in his own wrong, out of Mrs. Sturtevant's money. Nor could the surrogate adjudicate upon any equities that might arise in his favor, (if he acted honestly), by reason of the money thus applied being the income of real estate devised to her by his testator. The surrogate being an officer of limited jurisdiction, could not lawfully assume the plenary powers of a Court of Equity in the premises. *Cleveland* agt. *Whiton*, 31 *Barb. R.*, 544.

III. But, if there were any question as to the matters above stated, at least Martin's authority to intermeddle with the real estate ceased when he executed to Mrs. Sturtevant the deed of conveyance thereof, in May, 1863, and all items relating thereto subsequent to that date should be stricken from the accounts.

IV. If Martin as executor had wished to subject this real estate to the payment of the debt of his testator and so embrace it in his accounts, he might have applied (within the lifetime of Mrs. Sturtevant), to the surrogate (upon filing

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an inventory of the estate, and proving the debts he 'now alleges), for authority to lease the real estate aforesaid for that purpose. He preferred to file no inventory, but to keep all knowledge of the assets of the estate to himself, and assume authority to control Mrs. Sturtevant's real estate and to wait until death had sealed her lips, before rendering any account or making any claim. He should therefore be now left to his strict legal rights. (2 *Rev. Stat.*, 99, §§ 1 to 17.

Fifth.—The decree is untrue in adjudging that any uncollected assets or evidences of indebtedness were delivered over to these appellants.

Sixth.—The decree is erroneous in adjudging there is due the respondent either \$4,006 22-100 or \$5,301 58-100 from the estate of the testatrix of these appellants.

GILBERT DEAN, *for respondent.*

By the court, MULLIN, J.—By the will of O. W. Sturtevant, his wife became entitled to the whole of his estate that should remain after paying his debts.

On a settlement of the accounts of O. W. Sturtevant's executor, the executors of Mrs. S. were necessary parties. On such settlement the surrogate had power to ascertain the amount of the assets that passed into the hands of the executor, and the amount paid out by him upon the debts of the testator. And upon payment over to the legatees or next of kin whatever surplus of assets that might remain in his hands, he was entitled to a decree declaring such settlement to be final, and discharging him from the trust.

It is quite obvious that such a settlement involved no question as to the state of the accounts between the estate of the legatees under the will, except so far as may be necessary to ascertain what share of the assets belonged to each. In this case even that inquiry cannot arise, as Mrs. S. took the whole estate, after the payment of the debts.

It is equally clear that such a settlement involved no

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inquiry into the state of the accounts between the representatives of Mrs. S. and the executor of her husband, either in his character as executor, or as trustee of the estate. As executor, he was charged with no duty in regard to the real estate, and his accounts as trustee under a deed of trust in the lifetime of Mrs. Sturtevant could not be adjusted on this final accounting, as executor or trustee. It is only when a trust is created by a last will that the surrogate has power to settle a trustee's accounts.

If I am right in this, the decree must be reversed, and another accounting had, upon which the account in relation to the rents and taxes, &c., of the real estate must be excluded.

Commissions can only be allowed upon receipts and disbursements of money belonging to the estate of Mrs. Sturtevant.

The debt claimed by the defendant against his testator cannot be allowed to the defendant until its validity is legally established.

It is provided by § 37 of the 2d title, 3d chapter 6, of second part of revised statutes, that such debts may be proved to, and allowed by the surrogate.

The surrogate's court then has jurisdiction to try the validity of the executor's claim. I shall not express any opinion as to whether or not the debt claimed by the defendant is barred by the statute of limitations. That question will properly arise when it is considered by the surrogate.

As to the claim of the defendant to be allowed for debts of the estate paid by him out of his means, the only way he can be allowed for them is to treat him as assignee of such debts, and to allow him the share to which such debts would be entitled, had they remained in the hands of the original creditors.

The decree of the surrogate is reversed, and proceedings remitted to the court below, with directions that another accounting be had.

INGRAHAM, J., concurring.

Shelton agt. Gower.

SUPREME COURT.

THE PEOPLE *ex. rel.*, MATILDA SHELTON, agt. HENRIETTA GOWER.

Upon a writ of *certiorari*, where the judgment of the lower court is affirmed, with costs, the costs should be taxed as in an action at issue on a question of law.

Section 3, chap. 570, laws of 1854, as to the question of costs in such proceedings, is repealed by section 318 of the Code, as amended in 1862.

As section 310 of the Code only related to the costs after the issue, the provision does not destroy the right to the disbursements in the court below, which are taxable as part of the costs in the higher court.

New York Special Term March, 1872.

MOTION to re-settle costs. This was an action in a discript court, in the city of New York, in certain summary proceedings, in which the defendant in error was plaintiff, and the relator defendant. Judgment having been rendered in favor of the plaintiff, the proceedings were removed to the supreme court, on a writ of *certiorari*. The judgment of the court below having been affirmed with costs, the costs were taxed by the clerk as costs on appeal, as follows: Before argument, \$20; for argument, \$40; for the costs and disbursements in the court below, \$28. The counsel for the relator objected to the first two items, on the ground that under section 318 of the Code, the costs should be taxed as in an action on an issue at law. And to the last items, that they were not incurred in that court, and should not be allowed at all. The objection having been disallowed, the relator then moved to have the costs as adjusted, re-settled.

ROBERT W. DEFOREST, *for the motion.*

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I. This is a special proceeding, and comes before this court on *certiorari* to the justices of the court below, to review his judgment in a dispossessing proceeding. The clerk has taxed the costs under section 307, subdivision 5, of the Code which does not apply here. The costs in this proceeding are regulated by section 318 of the Code. By that section the costs are as in an action at issue on a question of law, and should have been taxed under section 307, subdivision 2, as follows: Before notice, \$10; after notice, \$15. Trial of issue of law.

II. The laws of 1854, chap. 270, section 3, can not operate to change this, as if that section is in any way inconsistent with section 318 of the Code, the latter section must be considered as repealing the former to that extent, it having been passed in 1862.

III. The twenty-eight dollars, fees paid to Mr. Justice FOWLER, the marshall, &c., were improperly allowed. This court did not attempt, nor had it the right in affirming the justice's judgment to award, besides the costs in this court, also as costs the fees paid in the proceeding before him. No construction of the order of affirmance of this court justified the clerk in taxing in the judgment of this court the fees of Justice FOWLER and the marshall in the proceedings before him. If they were taxed against the relator by Judge FOWLER, they cannot be taxed again here, and if by Judge FOWLER's decision he did not adjudge them against the relator on a mere affirmance of his judgment, it should not be so modified as to adjudge them now against her.

IV. The motion should be granted and the costs readjusted under §318 of the Code, and the fees of the justice, etc., should be disallowed.

JOHN BROOKS LEAVITT, *contra*.

I. The costs were properly taxed by the clerk under subdivision 5, of section 307 of the Code. By the laws of 1854,

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chapter 270, section 3, in special proceedings and on appeals therefrom, the costs may be allowed in the discretion of the court, and when allowed shall be allowed at the rate of *similar services in civil actions*. This act of 1854 is in no wise affected or repealed by any of the subsequent amendments to the Code. It has nothing to do with the Code, except that certain sections in the Code are by it made applicable to certain special proceedings. Section 318 of the Code is not applicable to costs upon a certiorari to review proceedings had before a magistrate, for the reason that that section, by its very terms, applies to a review in the supreme court of the decisions of a court of inferior jurisdiction. Justice FOWLER did not act as a court of inferior jurisdiction in this proceeding. But the proceeding before him was not before an inferior court, but before him as a magistrate in a special capacity. But even if section 318 of the Code is applicable to the costs of this proceeding, still they were properly allowed, because the proceedings were in the general term. An action which reaches the general term for review upon a question of law is treated so far as it respects the costs, as an appeal subject to general term costs. No other construction would harmonize the statute with the nature of the proceeding as respects the question of costs, because no question in an action at issue upon a question at law could reach the general term without being subject to the costs provided for proceedings in the general term.

II. The costs incurred before Justice FOWLER of the Third District Court were recoverable by the defendant in error under section 49, 2 R. S. page 516, which expressly provides that in all cases of application pursuant to the provisions of that act, the prevailing party shall recover costs. The question here is whether the defendant in error was entitled to have the costs taxed as a part of the costs of the proceedings which were brought into this court by such certiorari. The certiorari in its effect removed into this court the proceedings before Mr. Justice FOWLER, together with the re-

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cord of the same, and this court, in virtue of its general jurisdiction, had the power to do complete justice and to award costs, and did by its order award costs to the defendant in error, which allowance embraced all the costs to which the defendant was entitled in the proceedings, whether such costs had been incurred before the magistrate or in this court after the allowance of the writ.

III. For these reasons the motion to resettle the costs should be denied.

CARDOZO, J. I think the amendment of the Code in 1862 controls the act of 1854, and that the costs should be retaxed accordingly, except that as the section of the Code only relates to the costs after the issue, the provision does not destroy the right to the disbursements in the court below.

Ordered accordingly.

Moran agt. McClearns.

SUPREME COURT.

FRANCIS H. MORAN, respondent, agt. WILLIAM MCCLEARNS,
appellant.

Where the allegations of breaking and entering the close of plaintiff were clearly upon the face of the complaint mere surplusage, *held* that there was no error committed in so amending the complaint as to allow the true cause of action therein stated to remain.

An *overseer of highways* has no right in making repairs upon a highway within his district, in other respects suitable and proper, to change a *natural watercourse*, or the natural course of *surface water* drainage, so as to cast the water upon the lands of an owner abutting upon a highway where it had not been previously accustomed to flow, or to increase considerably in volume and quantity either the waters in a natural watercourse or from surface drainage, flowing upon such land, to the injury of the owner thereof.

The public must construct and repair their way with reference to the rights of adjoining owners of lands.

Fourth Department, June Term, 1872.

Present JOHNSON, TALCOTT and BARKER, *Justices.*

Action commenced in justice court, July 9th, 1869.

July 17th, 1869, parties appeared. Complaint—Trespass. Answer denied, and special matter. Cause tried July 26th, 1869. Judgment for plaintiff; damages, \$149; costs, \$13.80. August 6th, 1869, defendant appeals to county court for new trial. New trial had; judgment for plaintiffs, damages, \$150; costs, \$111.33; February 18th, 1870. Appeal to general term from judgment. May 1st, 1871, new trial granted. November 2d, 1871, new trial had, and judgment for plaintiff; damages, \$51; costs, \$330.71. December 22d, 1871, appeal to general term from order, denying motion for a new trial, and from the last judgment.

In June, 1869, defendant, in disobedience of the instruc-

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tions of commissioners of highways of the town of Onondaga, (not controverted in the bill,) dug a ditch along the west side of the highway, adjoining plaintiff's premises in said town, from, and opened a sluice at, school house, (noted on map which forms a part of this bill), and closed another sluice-way leading from said school house across the N. and S. road, and down the E. and W. or cross-road, which, from since 1860 or 1861, conveyed the waters draining and springing from the hills S. and S. W. of said school house, on to defendant's farm at a point noted on said map, commingling waters accumulating below the sluice near to a butternut tree, (also noted,) with a large volume of water accumulating above said sluice, which latter water had from time immemorial up to 1860 or 1861, been accustomed to flow through natural channels or ravines upon defendant's farm, through said butternut tree sluice, was precipitated upon the plaintiff's meadow, by the defendant, causing the damages complained of.

That the cross-road sluice at school house was erected and maintained under directions of highway authorities of said town.

That the butternut sluice was closed at same time of erection of said cross-road sluice in 1860 or 1861, which caused all the waters then to flow down said cross-road.

That the waters accumulating below or N. of butternut tree sluice prior to last-named erection were prescribed to run through plaintiff's meadow, but not in quantity sufficient to do any damage.

That more water accumulated S. of butternut tree sluice than N. of or below it.

That the distance from school house through Moran sluice to point of discharge on to defendant's farm, is about three times that down the cross-road to same point, and a forced passage, while the latter is easy, expeditious and natural.

The washing of cross-road was capable of permanent repair.

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Conflict of evidence on prescriptive right to flow waters above butternut tree sluice.

At folio 56½, jury charged in strict conformity with intimations of this court in 60 *Barb. R.*, 390.

Public had acquired right to turn waters below or N. of butternut tree.

Upon conflict, the question of prescription in public, to waters above or S. of butternut tree submitted to jury, (who found against defendant.)

That if public had such prescriptive right, our action could not be maintained.

Folio 64 limits plaintiff's recovery to damages caused by waters which public had no right to turn. The charge at folio 64, construed and understood by jury to mean butternut tree sluice instead of butternut tree.

LUDINGTON and GILLESPIE, *attorneys for plaintiff.*

I. Two questions only submitted to this court.

1st. Was there any error in allowing a proposed amendment of pleading not in form made?

2d. Was there error in charge at folios 62½, 63½, 64, or in refusing request at folios 68. 69?

II. Upon the first question, the 5th sub-division of §366 of Code, in express terms empowers the county court to allow such amendment.

1st. But such amendment was not essential; for all forms of action were abolished, and the complaint contained all facts necessary to maintain the action.

2d. *Quare clausam fregit* was the ancient form, because our close is just as effectually broken and entered by defendant's agent, the element of wrongful waters, as by a crow-bar or pick-axe applied to our gateway.

3d. No amendment was in form made.

III. Does the office of overseer of highways confer upon

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defendant in this case, rights, powers, immunities from action, an individual hath not?

We answer not; because

1st. At folio 38 the bill shows evidence not controverted; that defendant, as overseer, was directed by the commissioner of highways of said town not to do the act complained of.

2d. As matter of law, "all the powers of overseers must be taken to be subordinate to, and under the superior control of the orders of the commissioners, whom they are bound to obey." (*Bartlett agt. Crozier*, 17 *John's, R.*, 447.)

a. This case is not reversed or criticised, but followed and approved, up to the present time, by the court of appeals. (See *Wait's table of cases*, 37.) Hence the exceptions referred to assumed an official capacity in defendant to do this act, which the bill concedes did not exist officially, the act being interdicted by defendant's superior officers.

b. But suppose this was yet an open question, that there was conflict upon it, in evidence, then the request should have been qualified by making provisions for a finding whether the act was interdicted by competent authority.

Also as to whether the act was reasonable, necessary, and not an abuse of official discretion, if not interdicted by the commissioners. For a request to charge must be in such form that the court may charge in the very terms of the request without qualification. (*Carpenter vs. Stilwell*, 11 *N. Y.*, 79.)

c. The point here made is not that defendant, as overseer, was "not ordered" as put in this case in 60 *Barb.*, 391, but that he was ordered not to do the act complained of by the commissioners of highways. This must surely render his attempted justification abortive.

IV. As an officer, aside from the protest of the commissioners, he had no right to turn the waters above the butter-nut tree sluice upon us. (*Thompson on Highways*, 152;

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Cook on Highways, 113; *Plummer* agt. *Sturtevant*, 32 *Maine*, 325.)

Nor can defendant excuse himself by saying (as is contemplated by his request), that some other party had increased the flow before he did the act complained of.

He cannot thus visit the sins of another upon this plaintiff. (*Note (a) Martin* agt. *Riddle*, 26 *Penn.*, 415.)

a. A road must be worked so as not to obstruct the natural flow of water. (*People* agt. *Kingman*, 24 *N. Y.*, 559.)

Conceding that there are many cases of constructing, grading, leveling and repairing highways by officers having lawful authority in the which an injury occurs from a reasonable exercise of such authority which are *damnum absque injuria*.

Yet the courts draw between those cases and this, a sharp, well-defined line of distinction; and we assert that no approved case can be found in this, or in any other state, or in England, which confers upon the pettiest officer of a town immunity from action, who diverts from their ancient natural channels either surface or living waters which have been accustomed to flow on his own land from time immemorial, and casts them upon his neighbor's land to his damage, upon any pretext. But the converse of this has been held in all countries almost as long as those channels have existed.

V. The defendant, as a private person, has no such right. (*Sam'l A. Foot et al*, agt. *Bronson et al*, 4 *Lansing*, 47.) Nor to divert waters, which he has a right to turn if commingled with waters he is not entitled to divert. (*Thomas* agt. *Kenyon*, 1 *Daly*, 132; *Bellows* agt. *Sackett*, 15 *Barb.*, 97; *Bellinger* agt. *N. Y. C. R. R.*, 23 *N. Y.*, 42; *Kauffman* agt. *Griesmer*, 26 *Penn.*, 407.)

Surface water shall follow natural channels same as living water. (*Kauffman* agt. *Griesmer*, *supra*; *Miller* agt. *Laubach*. 47 *Penn.* 154.)

Therefore this judgment should be affirmed with costs.

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By the court, JOHNSON, J.—There was no error in the county court in allowing the amendment to the extent that it was allowed, as it did not change the cause of action or alter it in any particular.

True the complaint before the justice did in terms charge the defendant with breaking and entering the plaintiff's close, but the facts which constitute the real cause of action were stated, and these showed that the injury was occasioned not by breaking and entering, but by opening a sluice in a highway and turning the waters in the ditch of said highway upon the plaintiff's land to his injury.

The allegation of breaking and entering were clearly upon the face of the complaint mere surplusage, and there was no error committed in so amending the complaint as to allow the true cause of action therein stated only to remain.

The cause of action was plainly what would have been formerly known as an action on the case, and it was tried as such, and no injury was done to the defendant by the amendment.

The question at issue, and which was tried, was whether an overseer of highways has the right in making repairs upon a highway within his district, in other respects suitable and proper, to change a natural watercourse, or the natural course of surface water drainage, so as to cast the water upon the lands of an owner, abutting upon a highway where it had not been previously accustomed to flow, or to increase considerably in volume and quantity either the waters in a natural watercourse or from surface drainage, flowing upon such land to the injury of the owner thereof.

We think it clear that the overseer has no such right, and hold the law so to be.

This results, we think, from the nature of the right of the public in a highway.

It is a mere right of passage over the soil, and although the public has the right to alter, shape and fashion its roadway in such a manner as to render it convenient, safe and

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useful for the purposes of passage, still abutting and adjoining lands, outside of the way and not servient estates to this right of way so as to authorize the public through its officers to change a natural watercourse, or the natural course of surface waters in regard to such lands to the injury of the owners with impunity.

The public must construct and repair their way with reference to the rights of adjoining owners of lands.

The defendant, in his answer, justified the acts complained of upon the ground that he was overseer of the highway, and that such acts were necessary for the benefit of the highway.

The road was a north and south road, and the water flowed northward through the ditch on the west side.

The evidence showed and the court held that in 1862 the public had acquired by user a prescriptive right to have the water flow through this ditch from a point as far south as a certain butternut tree, and through the sluice which the defendants opened at the time in question upon the plaintiff's meadow where it flowed at the time complained of.

In 1862 a change was made by filling up the west ditch at a point between the sluice in question and the butternut tree, and another sluice made across the road at that point, which had the effect to turn all the water coming from the south to that point down the south ditch of an east and west road, which there intersected the north and south road.

The effect of this had been to make a deep gully on the south side of the east and west road, and to render the road unsafe and dangerous to travelers. To remedy this difficulty and to prevent further injury to the east and west road the defendant, as overseer, filled up the new sluice, cleaned out the west ditch on the north and south road, and restored it to the condition in which it was at that place prior to 1862.

He also reopened the sluice, which, it seems, had in the meantime become filled up or closed, so that the water in the

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west ditch passed through and upon the plaintiff's land, as it had prior to 1862.

The court ruled and charged the jury, that if by this last change the defendant had only restored the west ditch and the sluice then reopened, to the same condition in which they were prior to 1862, and no water passed through and upon the plaintiff's land except what came into the ditch between the sluice through which the water passed and the butter-nut tree, the defendant's acts were justifiable, and the action could not be maintained.

There was evidence in the case tending to show, that prior to the time when the new sluice was made and the water turned down the south ditch of the east and west road, there was a sluice just above and south of the butternut tree across this north and south road, by means of which all the water coming through the west ditch south of the butternut tree was carried across the road and down through a natural depression in the surface of the land, upon lands owned by the defendant, and that this sluice was filled up about the time the ditch was filled up, at the intersection of the east and west road, and the sluice there made to carry the water into the ditch of the other road, the effect of which was to bring the water from a distance considerably further south than the butternut tree, and increased the volume and quantity of water in the west ditch at the point of the intersection of the east and west road and at the sluice, by which the water was carried upon the plaintiff's meadow. It was claimed by the plaintiff and the evidence on his side tended to show that it was this increased volume and quantity of water which occasioned the injury, and that but for this increase no injury would have happened. These facts were controverted by the defendant, who gave evidence tending to show that for more than twenty years prior to 1862 the water had flowed through the west ditch the same distance from the south, and that no change had been made within that time by

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which the quantity of water flowing through that ditch had been increased.

These disputed questions the court submitted to the jury, and charged that if the water from the same distance had flowed through the ditch for twenty years, the plaintiff could not recover, but if it had not, and the injury was occasioned by the increased volume of water from the longer distance, the plaintiff was entitled to recover such damages. The jury found in favor of the plaintiff. The defendant's counsel excepted to this part of the charge.

The charge, we think, was clearly right.

The defendant, doubtless in the discharge of his official duty as overseer, had the right to make such change as he might in the exercise of his judgment deem necessary, not only by way of repair of the road, but by way of preventing further injury, provided that in so doing he did not interfere with the rights of others.

He might for this purpose unquestionably restore the way as it was when the change was made in 1862, and the public to all the rights they then had which had not become forfeited.

But if he undertook to restore, he should have restored the way in all respects to the condition it was in at and prior to 1862, and the public to the rights it then had.

He had no right to leave the sluice, which would carry off water from the ditch to his own land, closed, and open the sluice which would carry the water which should rightfully pass to his own land upon the land of his neighbor. This the jury have found he has done.

The court properly refused to charge as requested by the defendant.

The substance of that request was that the defendant had the right to make the change for the benefit of the road if he acted in good faith, even if it had the effect to throw more water upon the plaintiff's land than had been carried there before, or than would have gone

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there had the entire way been restored to its former condition.

This proposition, as we have undertaken to show, cannot be maintained.

It must be obvious to any one that an overseer of highways cannot by any act of his own either confer any new rights upon the public, or impose any new burdens upon individuals to their injury.

The judgment, we think, is right, and should be affirmed.

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SUPREME COURT.

EDWARD SAVAGE, agt. THE HOWARD INSURANCE COMPANY.

EDWARD SAVAGE agt. THE LONG ISLAND INSURANCE COMPANY.

The defendants issued a *policy of insurance* to Marilla Kirk, executrix and trustee of Andrew Kirk, deceased, insuring "the heirs and representatives of Andrew Kirk, deceased," against loss or damage by fire for one year, to the extent of \$1,000, on a grist mill belonging to said estate. Subsequently Mrs. K., the trustee during the term of insurance and previous to the fire, sold said mill to one Arnold (who was in possession under a lease) for \$8,000, and took back a mortgage to secure \$7,000 of the purchase money. There was no assignment of the policy by Mrs. K. nor any notice of the sale given to the company. The plaintiff was substituted as trustee in place of Mrs. K. before the commencement of this action. The policy contained the following clause, to wit:

"If the property be sold or transferred, or any change takes place in the title or possession, whether by legal process, or judicial decree, or voluntary transfer, or conveyance," then the policy shall be void.

Held that this clause did not operate as a forfeiture or render the policy invalid. It was the *trust fund* that was intended to be secured by the insurance, and there has been no transfer of that property or interest. *Affirming S. C. at Special Term, 43 How.)*

Third Department. General Term, October 1872.

Before POTTER, PARKER and DANIELS, J.J.

THESE two cases are appeals from a judgment upon a trial at circuit, before a judge, without a jury. The findings of fact are without exception, and the two cases are without material difference.

The material portions of such findings are as follows:

1. That Andrew Kirk, late of the city of Albany, now deceased, in and by his last will and testament, appointed

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Marilla Kirk as sole executrix thereof, and that said will had been duly proved as a will, having reference to both real and personal estate, and that said Marilla Kirk duly qualified and entered upon her duties as such executrix of said last will and testament.

2d. That the said Andrew Kirk, in and by his last will and testament, gave the said Marilla Kirk all his real estate in trust, among other things to hold, sell and dispose of the same, and to take back mortgages upon such sales, and to collect all the rents issues and income thereof, and to let and lease all or any portion of said real estate, and with power to insure any of the said property from loss or damage by fire; at her discretion pay the premiums of insurance and collect the amount of loss when sustained, and after deducting from rents and income of said estate her expenses and annuity provided in said will, then she is directed to divide the remainder of the nett income of said estate among the heirs of the said Andrew Kirk, deceased.

3d. That the said Andrew Kirk, at the time of his death, was the owner of the said estate embracing the two-story frame grist mill and machinery hereafter mentioned; and the same, by said will, passed to said Marilla Kirk, in trust, as aforesaid.

4th. That the defendant is a corporation duly created by and under the laws of this state. That on or about the 19th day of September, 1868, in consideration of the payment by the said Marilla Kirk, as executrix as aforesaid to the defendant, of the premium of twenty dollars duly paid, the defendant, by their agents, properly authorized thereto, made, executed and delivered to the said Marilla Kirk a policy of insurance No. 2652, duly signed by the treasurer and secretary of said insurance company, wherein the said insurance company certified and agreed to insure the heirs and representatives of Andrew Kirk, deceased, against loss or damage by fire to the amount of \$1,000 on their two-story frame

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grist mill, machinery and fixtures attached owned by them, and propelled by water, situate on the Norman kill, in the town of Bethlehem, Albany county; and the said defendant also therein agreed to make good unto the said assured, their executors, administrators and assigns, all such immediate loss or damage not exceeding in amount the sum or sums insured as above specified, as shall happen by fire to the property so specified, from September 19th, 1869, to September 19th, 1870, at 12 o'clock at noon.

5th. That the said policy of insurance did contain the following conditions, among other things, to wit: "If the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer, or conveyance, etc., then, and in every such case, this policy shall be void; and also when property has been sold and delivered or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate."

6th. That Henry O. Arnold went into possession and occupation of said mill in March, 1869, as a tenant of said Marilla Kirk, executrix, and was in possession and occupation of said mill at the time said policy of insurance was given, and has since continued to occupy said mill.

7th. That prior to the burning of said grist mill, and on or about the month of February, 1870, the said insured grist mill was conveyed by said Marilla Kirk, as such executrix, by deed to said Henry O. Arnold for \$8,000; that said Arnold paid cash \$1,000, and gave back to said Marilla Kirk, as such executrix, a purchase money mortgage for \$7,000, as and for the balance of the consideration money; that the policy of insurance was not assigned, and that the defendant had no notice of said sale, and that no consent to the same was indorsed on said policy; that said mortgage has not been paid or any part thereof.

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8th. That on the 31st day of July, 1870, said grist mill was entirely destroyed by fire, together with a large portion of the machinery and fixtures, which was a loss to the said heirs and representatives of Andrew Kirk, deceased, to the amount of over \$4,000.

9th. That due notice of said fire and proof of losses were given to the said insurance company in the manner required by them, and according to the conditions of said policy, on the first day of September, 1870.

10th. That, on the 29th day of June, 1871, the said Marilla Kirk was, upon her own petition, removed from the said office in due form by an order of the Surrogate of the County of Albany, in which the said last will and testament of Andrew Kirk, deceased, was admitted to probate, and was recorded, and the plaintiff was at the same time duly appointed by order of said surrogate administrator, with the will annexed of said Andrew Kirk, deceased, and duly qualified as such.

11th. That, on the 20th day of August, 1871, the said Marilla Kirk presented to the Supreme Court her resignation of the trusts hereinbefore set forth, and the said court, upon said resignation, and upon the petition of Mary K. Harrison, one of the heirs and *cestui que trust*, interested in the execution of said trusts, by an order duly made at a special term held at the City of Albany, on the said 29th day of August, 1871, accepted said resignation, and removed said Marilla Kirk from her said office, and appointed the plaintiff in her place testamentary trustee, under said last will and testament, with power to execute said trusts.

FINDINGS OF LAW.

1st. That the words "heirs and representatives" sufficiently described Mrs. Marilla Kirk, the executrix and trustee, who had, under the will of or descent from Andrew Kirk, deceased, the title to the property.

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2d. That the conditions contained in the policy should be construed as referring to the transfer or conveyance of the entire insurable interest.

3d. That the conveyance by Mrs. Marilla Kirk, as executrix, to Henry O. Arnold, and the reconveyance by Henry O. Arnold to said Marilla Kirk, as executrix, by way of mortgage, for seven-eighths of the title, does not constitute such change or transfer of title or interest as to make void the policy.

6th. That the plaintiff is entitled to recover from the defendants the amount of insurance claimed, being one thousand dollars, with interest thereon from November 1, 1870, making at this date one thousand and ninety-four dollars and sixty-seven cents.

The appeal to this court is upon the law of the case as found by the judge.

JOHN GOULD, *for plaintiff*

I. Policies of insurance should be construed liberally, for the interest alike of both parties, "Justice should never be strangled in the nets of form." *White agt. the H. R. Ins. Co., 15 How., 288.*

II. The plaintiff having contracted with the defendants for insurance, and not having assigned the policy, although having sold the premises without notice to or consent of the defendants, retains an insurable interest in the property, to the extent of seven-eighths of the entire value of the property destroyed, as mortgagee, and is entitled to receive the insurance. (*Shotwell agt. The Jeff. Ins. Co., 5 Bosw., 247; The Aetna Fire Ins. Co., agt. Tyler, 16 Wend., 385; Howard agt. The Albany Ins. Co., 3 Denio, 301.*)

III. A mere change of ownership of the subject insured will not avoid the policy, provided there be an insurable interest at the time of the loss. (*Fernandez et al., agt. The Great Western Ins. Co., 3 Robt., 457; Phelps, Executrix,*

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etc., agt. *The Gebhard Fire Ins. Co.*, 9 *Bosw.*, 404; *Hitchcock* agt. *The North Western Ins. Co.*, 26 *N. Y.*, 68.)

IV. As the special clause relied upon by the defendants (last part of Condition 1 and Condition 4), operates by way of forfeiture, it is to be construed strictly, and the transfer and termination of interest in the property in order to make void the policy, must be a transfer or termination of the whole insurable interest of the insured in such property. Any change of the title which does not deprive the assured of insurable interest, does not work that result. (*Lazarus* agt. *the Commonwealth Ins. Co.*, 5 *Pick.*, 76; *Strong* agt. *The Manufacturers' Ins. Co.*, 10 *Pick.*, '40.; *Amasa Stetson* agt. *The Mass. Mut. Fire Ins. Co.*, 4 *Mass.*, 330; *Jackson ex dem. Stevens et al.*, agt. *Silvernail*, 15 *Johns.*, 278.)

V. Within the good sense and spirit of the terms of the body of the policy and of the "fourth condition," the words, "any sale, alteration or transfer" should be construed as applying to acts which "terminate" the interest of the assured (*Van Deusen* agt. *Charter Oak Ins. Co.*, 1 *Abb.*, *N. S.*, 349, 358, *S. C.*, 1 *Robt.*, 55.)

This sale did not terminate the interest of the insured.

The plaintiff has seven-eighths of the entire interest.

The theory of a purchase money mortgage is that the title passes from vendor into vendee and back to vendor so rapidly that even a wife's dower does not attach. In this case the title passed out of and back to the plaintiff so rapidly that it was one transaction, and therefore could not render void the policy.

VII. Only a small part of the conditions pleaded by way of defense, applies to this case. All but a short clause refers to representations and other formalities to be observed at the time of effecting the insurance, and are only applicable to the acts or statements or condition of property at the time of making policy.

VIII. Henry O. Arnold, the owner of the grist-mill (the property insured and which was burned), in his own right

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and as purchaser of the property cannot claim the least interest in the policy, as the policy was not assigned.

Therefore the defendants will escape any payment of loss unless held liable to the plaintiff.

IX. Change of possession provided against in Condition No. 1.

Yet insurance companies pay losses to owners, although such owners lease their property and a change of possession takes place continually without any consent of the company.

In this case there was no change of occupation or possession even after sale.

X. The mortgagee in equity without fraud on his part should be protected, although he may not have conformed to an arbitrary rule of the insurance company when the company can show no fraud on the part of the insured, and no damage on account of any breach of any condition.

XI. Marilla Kirk, as executrix and testamentary trustee, was both real and personal representatives of Andrew Kirk, deceased. (2, *Burrill's Law Dict.*, 407 ; 2, *Stephens' Com.*, 243.

XII. The title to the grist mill passed to Marilla Kirk, in trust, by virtue of the will. She, as executrix and trustee, had an insurable interest therein, and paid the premium and received the policy, and is properly described by the terms "heirs and representatives." *Clinton agt. Hope Ins. Co.*, 51 *Barb.*, 647, 652 ; *Herkimer agt. Rice*, 27 *N. Y.*, 163.

XIII. Unless Marilla Kirk is the proper party to recover the insurance, the policy is of no avail to any one, for there was no privity of contract with any one else.

M. HALE, *for defendant.*

I. The policy contained a provision that "if the property be sold or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer, or conveyance, without the consent of the company indorsed thereon, the policy shall be void."

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It was proved and admitted, and found by the court, that in February, 1870, Mrs. Kirk conveyed the insured property to Henry O. Arnold for \$8,000 (taking back a mortgage for \$7,000 of the purchase money); that the defendant had no notice of the sale, and that no consent to the same was indorsed on the policy.

The provision of the policy above quoted was a part of the contract between the parties, and must be construed so as to give effect to the intent of the parties, and the language employed must be taken in its ordinary popular sense. (*Springfield F. & M. Co., agt. Allen*, 43 N. Y., 389, 394.)

Upon any possible rule of construction, it could not be doubted for a moment, if the question were an original one, that the conveyance of the entire fee was a change in title, or that the purchase by Arnold for \$8,000, and the deed by Mrs. Kirk constituted a sale, and no one could be found who would say that the taking back of a mortgage for the purchase money prevented a "change," and left the title the same as before the conveyance, or that the property was any the less "sold" because a mortgage was given for part of the price. At the date of the policy and renewal, Mrs. Kirk held title in fee in trust for the benefit of the heirs of Andrew Kirk, deceased. At the time of the fire, Arnold was the owner in fee, subject to a mortgage for \$7,000 held by Mrs. Kirk. Mrs. Kirk, in her proof of loss, swears that the property was "sold" and conveyed by her to Arnold.

And in order to sustain this recovery the court must hold that these facts show no "change in title," and also that though Arnold "purchased" the property it was not "sold."

The learned judge, before whom the case was tried, however supposed that the case of *Hitchcock agt. N. W. Ins. Co.*, (26 N. Y., 68) had established a doctrine upon which the plaintiff here could recover.

In this it is respectfully submitted the learned judge was manifestly in error.

The clause relied on by the defendant in that case was that

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in case of the transfer or termination of the interest of the assured, either by sale or otherwise, without the consent of the company, the policy should be void; and the court held that a change of the title, which did not deprive the assured of insurable interest, did not work a forfeiture.

But here the agreement is, that if the property be sold or transferred, or if any change take place in title or possession without consent of the company, the policy shall be void. It is conceded in the case of *Hitchcock agt. N. W. Ins. Co.*, (26 N. Y., 74), that language might be used which would accomplish the result claimed by the defendant. Can any language be suggested more apt for that purpose than that employed in this case, by which any sale of the property or any change in title without the company's consent, is made a forfeiture?

And it is virtually conceded by Judge SELDEN in that case, in the language quoted by the court below in this case, that there was there a "change of title," though not a termination of interest.

Indeed, upon the construction given to the policy by the court below, neither the words "change of title," nor the words "if the property be sold," have any force.

The supreme court of Massachusetts, under a policy with the condition that all alienations and alterations in the ownership of the property insured without consent should make void the policy, held that the making of a mortgage by the assured, though not an "alienation," was an "alteration," and not having been consented to by the company, rendered the policy void. (*Edmunds agt. Mutual Safety F. Ins. Co.*, 1 Allen, 311; and see *Springfield F. & M. Ins. Co.*, agt. Allen, 43 N. Y., 397.)

II. The policy also contained a clause, that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, * * * it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void."

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The policy was issued to the "heirs and representatives of Andrew Kirk, deceased."

Mrs. Kirk, the original plaintiff, was not an heir of Andrew Kirk. As his executrix, she had not the "entire, unconditional and sole ownership" of the property.

In fact the title neither of Mrs. Kirk, nor of the heirs or devisees of the deceased, was an unconditional and sole title. Mrs. Kirk's title was in trust for the benefit of the heirs. The heirs had no legal title. It was a case where, by the terms of the policy, the nature of their title should have been expressed in the written part of the policy.

III. The plaintiff was not the real party in interest. If the contract of insurance was valid it was with the heirs and representatives of Andrew Kirk, deceased, the owners of the property, and they alone could maintain the action.

IV. For the reasons above stated, the judgment should be reversed.

By the Court, POTTER, J.—It shall be sufficient, in the review of this case, to examine only the two questions presented as objections to the recovery :

1st. That the plaintiff had no interest or title to the property insured, and was not, therefore, a party in interest entitled to recover. And 2d. that the persons named as "heirs and representatives" had no title to the property or interest in the property. The whole policy is not set forth in the case, but it sufficiently appears from the findings of fact, which are uncontroverted, that one Marilla Kirk held the insured property as a testamentary trustee and executrix for the "heirs and representatives" of one Andrew Kirk, deceased, and that the policy of insurance was issued by the defendants to the said Marilla Kirk for the benefit of such "heirs and representatives." • That by the terms of the will the said Marilla held the said real estate in trust with power of alienation, and to hold the proceeds in trust, with the rents

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issues and income, and with directions to divide the estate among the heirs of the testator.

As such trustee, she had an insurable interest in the said property, and the issuing of the said policies to her by such designation; the property would, if it remained real estate, be properly represented by her as trustee, and if sold under the conferred power in the will, would still be represented by her until divided, as the proper legal owner and representative of said heirs or *cestue que trust*. The form of the policies is presumptive evidence that the insurers had knowledge of the character and title of the property they insured, and that they insured it accordingly.

The substitution of a new trustee by a judicial exercise of power did not increase the hazard or change the title to the property, and did not affect the representative character of the insured or the interest therein. This objection, therefore, has no merit.

2d. The judge found as a fact that during the term of insurance and previous to the fire, that Marilla Kirk, the trustee, sold certain real estate which included the grist mill (the property insured) for the sum of \$8,000 to one Henry O. Arnold without any change of possession, and took back a mortgage for \$7,000 to herself as executrix for so much of the purchase money at the time; that the policy of insurance was not assigned; that the defendant had no notice of the sale, and that no consent to the same was indorsed upon the policy, and that the insured property was worth about \$4,000.

There is a provision in the policy in the following words: "If the property be sold or transferred, or if any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer, or conveyance, * * * this policy shall be void." Upon this condition the defense rests, claiming a breach. The specific objection or exception to the finding of the court in this particular is, that it did not find; that the deed and transfer of the title to the

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property to Henry O. Arnold, without the consent of the company, was a sale and transfer of the property, and a change in the title thereof by voluntary conveyance, and that it rendered the policy void. The point of the appellant in this regard is confined to his exception as made. This court will not feel called upon to discuss the point upon any broader ground than that presented by the case to the court below and by the argument presented here.

The meaning and intent of insurance contracts, like all others, is to be obtained first from the language employed, and if by settled rules of construction the intent is not clear from the language itself, then the surrounding circumstances existing at the time the contract was entered into may be resorted to to solve the difficulty and to dispel any obscurity. (*Dwarris*, 177, 178, *Amer. ed.*) The trustee of the beneficiaries of the insured property was authorized (by the testator) to insure it for the beneficiaries. The form of the insurance implies, on the part of the defendant, knowledge of this power and of the parties in interest. This interest of the beneficiaries was in the trust fund whether it remained in the real estate or became personal by alienation. This fund, or the lien which secured it, was the property insured. So long as this fund remained in the hands of the trustee, whether in real or personal estate, the trustee, as such, had an insurable interest therein. Insuring property to one for "heirs and representatives" by necessary implication carries the knowledge that the beneficial interest was in other than her whose name was used as the representative. The language, in its ordinary and popular sense, expresses that idea, and this made it a correct description of the insurable interest that was insured.

As mortgagee of the same estate the trustee had the same insurable interest in the fund, as personal, as when it consisted of real estate. (*Gordon agt. Mass. & F. V. Ins. Co.*, 2 *Pick.*, 249.) With this presumption of knowledge by the defendants of the real ownership of interest in the fund, the

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fund was the property insured; and this becomes the apt and appropriate description of the property, and is clear evidence of what is the meaning and intent of the parties, and truly indicates what property or interest was intended to be insured. (*Springfield F. and M. Ins. Co. agt. Allen*, 43 N. Y., 395.) And it was not necessary, under the circumstances stated, that the interest insured should be more specifically stated. (*Id.* 396.) The policies were made and accepted with reference to this knowledge. So, too, it is held in a case where the description of the property insured was general, if a sale is made, and the vendor agrees to stand as trustee for the vendee, his insurable interest remains. (*Per Lord ARBINGER in Powells agt. Innis* 11, *Mees. and W.*, 13.) And so where the sale is either conditional, or the vendor retains an insurable interest as mortgagee or guarantor, (1 *Phil. on Ins.*, § 90,) and where the insurance is for the benefit of another who has an insurable interest in it, and the insurance in terms imports that it is for the benefit of such other. (*Id.*, § 91.) This insurable interest has never ceased. This interest was never transferred. It was in a fund constituted of real estate; it remained an interest in the same estate.

The case of *Hitchcock agt. N. W. Ins. Co.*, 26 N. Y., 68, settles the rule that in cases where there is no special clause in the policy to the contrary, that no transfer of interest will work a forfeiture which does not entirely deprive the assignor of a policy or an insurable interest therein. In that policy was the following clause: "The interest of the assured in this policy or in the property insured is not assignable unless by the consent of this corporation manifested in writing, and in case of transfer or termination of any such interest of the assured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect. The vessel insured was sold upon a contract retaining a lien for \$4,000, and the policy retained as security for such lien; but no consent of the insurance company was obtained. How does that condition differ from the one

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in the case at bar? "If the property be sold or transferred, or any change takes place in the title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance, * * * the policy shall be void." In a very recent case of *Kitts* agt. *The Massasoit Ins. Co.*, decided at general term in the fifth judicial district, (56 *Barb.*, 177,) it was held "That the sale of property and taking back a mortgage to secure the purchase money, does not change the title within the meaning of a policy of insurance, that in case of any change of title in the property insured the policy shall cease and determine." See also *Van Deusen* agt. *Charter Oak and Marine Ins. Co.* (1 *Robt.*, 55.)

These cases are easily distinguished from *Lappin and Charter Oak, &c., Ins. Co.* (58 *Barb.*, 325.) There the whole title was changed, and nothing was left to bring the case free from the express conditions.

Unless, then, the clause in the policies before us operates as a forfeiture, the case comes within *Hitchcock* agt. *The N. W. Ins. Co.*, and *Kitts* agt. *The Massasoit Ins. Co. supra.*

This is the real question in the case. I think the only question. If, as we have already cited cases to show it was the trust fund that was intended to be secured by insurance, there has been no transfer of that property or interest, and the judgment is right. See authorities in cases last cited, which go still further. But it is claimed that the language of the condition in the case at bar is much stronger and more full than in *Hitchcock* agt. *The N. W. Ins. Co.*, in having in it the words, "or any change takes place in title or possession," but in this it hardly differs from the case of *Kitts* agt. *Massasoit Ins. Co.*,. And see *Ayers* agt. *Hartford Ins. Co.*, (17 *Iowa*, 477,) and same title, (21 *Id.*, 185,) same title (*Id.*, 193,) which, in effect, hold the same rule. Forfeitures are never favored in law or equity, and a contract under which a forfeiture is claimed is to be most strictly construed. This is one rule. There is no reason why it is not applicable to

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this case. *Vattel*, in his 19 rules or maxims of construction, lays down this for the construction of agreements: "It (the construction) ought to be made in such a manner that all the parts appear consonant to each other, that which follows with that which went before, unless it manifestly appears that by the last clauses something is changed that went before."

Rutherford lays down the rule as follows: "When we explain a doubtful part of an agreement by the help of some other part of it, the clause which we make use of for this purpose is a circumstance which is connected with the clause to be explained, * * as they both came from the same hand, and are both formed together in the same writing. If these are sound rules, as I think they are (2 *Kent, Com.*, 555), we find another clause in the same policy which must be read in connection with the clause upon which the defendant relies for his defense, which, read in the light of the above rules of construction, so qualifies and explains the condition set up as a defense, as to bring it into harmony with the rules above laid down and in cases cited from the courts. This other clause follows the condition claimed, and is in the following words: "When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased this insurance on such property, shall immediately terminate." Reading this last clause in connection with the clause set up as far as a defense: "It so qualifies and explains the former as to take away not only the force claimed for it by the defendant, but also to make it consistent with the law as laid down in the decisions we have above cited. It certainly becomes a necessary inquiry by the court to say, for what purpose these latter words are made a part of the agreement? By every rule of construction they are to be given some meaning. They cannot, upon examination, be found to add anything to the former clause. Every possible change and disposition of the property is in that provided for,

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and transfer is intended by the previous clauses. But if used by way of explanation they are reasonable, consistent, harmonious and full of meaning. They clearly explain, what kind of change which makes the policy void, viz.: one that divests the insured of all insurable interest in the property insured. The whole conditions of the policy are to be viewed and compared in all their parts, so that every part of them may be consistent and effectual. (2 *Kent Com.*, 555.) The best interpretation is always made by the antecedents and the consequents. (2 *Inst.*, 317.) *Ex antecidentibus el consequentibus fit optima interpretatio..* (*Brown's Maxims*, 249.)

Thus construing this contract would be giving to every part of it a meaning, and that meaning consistent with every other part of the contract, and consistent also with established law.. If I am right in these views of construction the contract of insurance is made a plain, simple and intelligible contract, easily understood, all its parts made to give it effect, and is taken without admitting of arbitrary, forced and technical resorts to aid in its destruction. The interpretation I have given it is a construction most conformable to the principles of natural justice; it is obtained without even resorting to the principle that one's own covenant shall be taken most strongly against himself. It can stand without that upon a basis of good sense, having good faith to support it, as well as the moral aid of holding that agreement should be enforced, undertakings executed and promises performed.

I think the judgment should be affirmed.

DANIELS and PARKER, J.J., concured.

Woodbury agt. Morton.

SUPREME COURT.

WILLIAM WOODBURY, *appellant*, agt. ALANSON P. MORTON,
respondent.

Upon an order of the county court granting a new trial in an action in that court upon a case and exceptions there made, the two items of \$20 before argument and \$40 for argument, cannot be allowed on the *taxation of costs*. Such a case is expressly excepted from the operation of sub. 5, §307 by its very terms. The appeal having been taken under the second paragraph of §344 of the Code. Where the plaintiff had an order for a new trial in the county court, on an appeal from a verdict rendered for the defendant in that court, in an action originating in a justice's court, where the plaintiff had a judgment in his favor, and the general term of the supreme court, on appeal, affirmed the order, granting the plaintiff a new trial; and the attorneys for the respective parties, previous to the decision of the supreme court, entered into a stipulation that in case defendant was defeated in the supreme court on such appeal and the court refused to allow him an order to appeal to the court of appeals, the plaintiff might enter judgment in the action against the defendant "for the amount of the judgment rendered by the justice with costs of this action to be taxed."

Held, that the plaintiff, on retaxation of costs, was not entitled to *interest on the justice's judgment*. The stipulation did not give him any interest, and the judgment did not draw interest by operation of law as the appeal from it to the county court superseded it, and the new trial in the county court put an end to it, so that it was no longer a claim in the plaintiff's favor.

General Term, Fourth Department, March, 1872.

Present MULLIN, P. J., JOHNSON and TALCOTT, JJ.

THIS is an appeal from an order directing a re taxation of costs and the disallowance thereon of certain items before taxed.

By the court, JOHNSON, J.—The two items of \$20 before argument and \$40 for argument was properly

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directed to be stricken out and disallowed on retaxation. The plaintiff contends that he was entitled to have these items taxed, under sub 5 of §307 of the Code. But the appeal to this court which was argued, and upon which the right to have these items taxed is claimed, was from an order of the county court, granting a new trial in an action in that court, upon a case and exceptions there made. It is one of the cases expressly excepted from the operation of sub 5 by its very terms. The appeal was taken under this second paragraph of §344. This sub 5 of §307 has been amended by the addition of this second paragraph of §344 to the exception, since the decision in *Williams*, agt. *Murray*, (32 *How.*, *R. R.*, 18.) It is conceded by the appellant that the item of \$10 before motion was properly disallowed, and ordered to be stricken out. As to the item of \$12 20, interest on the judgment before the justice, from the time it was docketed, we think it was also properly ordered to be disallowed in the retaxation. The judgment in the action was to be entered upon a stipulation between the parties to the effect that in case the general term of the supreme court should deny the defendant's application for leave to appeal to the court of appeals, the plaintiff might enter judgment in the action against the defendant "for the amount of the judgment rendered by the justice HIRAM PARKER, with costs of this action to be taxed. The action was commenced in a justice's court, where the plaintiff had a judgment, from which the defendant appealed for a new trial to the county court of Cattaraugus county. A new trial was had in that court, and the defendant had a verdict which was set aside and a new trial granted in favor of the plaintiff with costs, to abide the event. This order granting a new trial was afterwards on appeal by the defendant to the general term of this court affirmed, the defendant then moved for leave to appeal from our order to the court of appeals, which motion was denied. The plaintiff is, therefore, entitled to his judgment in pursuance of the stipulation

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for the "amount" of his judgment before the justice. The term "amount" could be usually understood to include the principal with the legal incident of interest if the sum or demand specified bore interest, as matter of law. Otherwise the amount could be no more than the sum specified in the obligation or claim referred to. The right to interest in every case vesting in contract depends upon agreement express or implied. There must be either an express agreement to pay interest, or the circumstances of the case must be such that the law will imply a promise to pay it. When there is an express agreement in writing to pay a certain sum, or to do a certain thing at a future day specified, or upon the happening of a particular event, and nothing is expressed about the payment of interest, it does not bear interest until after the day of payment has passed.

The law in such a case only implies promise to pay interest after the payment falls due. And the stipulation upon which the judgment was to be entered was in writing, and nothing was expressed in it in regard to interest. The question then is, whether as matter of law this judgment before the justice had been drawing interest from the time of its rendition notwithstanding the appeal from it for a new trial in the county court. If not interest was not an incident, and formed no part of the amount of the judgment, and was not embraced in the stipulation. By the appeal for a new trial the judgment before the justice was superseded, and the new trial in the county court put an end to it, so that it was no longer a claim in the plaintiff's favor. In that contract it did not bear interest, and interest being no legal incident of that judgment was not embraced in the term "amount" in the stipulation. In such a case the term "amount" can only mean the sum for which the judgment was rendered. It is to be observed that the stipulation was not intended, nor did it have the effect to withdraw the appeal and to restore the justice's judgment to its original force and vigor; but the judgment referred to as containing the sum or amount for

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which the plaintiff might take judgment in virtue and by force of the written stipulation, and as no interest was stipulated for, none can be taxed. The plaintiff is no more entitled to interest on the amount, than he would have been had any other sum been named in the stipulation. The order must, therefore, be affirmed with \$10 costs of appeal.

Lee agt. McClosky.

SUPREME COURT.

JAMES C. STRONG agt. GEORGE F. LEE, *administrator, &c.*,
of JOHN McCLOSKEY, *deceased*, and VICTORINE McCLOSKEY.

In an action in the nature of *scire facias* to revive a judgment and obtain execution against the property of a deceased judgment debtor, his personal representatives and heirs at law, cannot be joined as co-defendants.

The personal estate of the deceased must be exhausted before resort can be had to the realty.

In case of such joinder of defendants the court cannot, under the last clause of section 172 of the Code, order the action to be divided into two actions.

Erie Special Term, March 28, 1872.

ACTION to revive judgment and have execution against the administrator and one of the heirs at law of the deceased judgment debtor.

Demurrer by each defendant separately to the complaint.

JOHN C. STRONG *for plaintiff*

GEORGE F. LEE *for both defendants.*

The facts sufficiently appear in the opinion.

LAMONT, J.—Can this action, which is the Code substitute for the former writ of *scire facias*, to obtain execution upon a judgment recovered in his lifetime against a now deceased judgment debtor, be maintained against his personal representative and heir at law as co-defendants? The personal estate is the primary fund for the payment of debts of deceased persons, and such has been the law time out of mind. (*Lupton agt. Lupton*, 2 *John.*, ch. 628.) Chancellor KENT says that heirs are rendered liable for the debts of the ances-

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tor, by simple contract as well as by specialty, and whether specially named or not, to the extent of the assets descended, on condition that the personal estate of the ancestor shall be insufficient and shall have been previously exhausted. (4 *Kent*, 420.) In (2 *Saunders* 72, note 3,) it is said that where a judgment is had against one who dies before an execution, a *scire facias* will not lie against his heir and terretenants, until a *nihil* is returned to a *scire facias* against his personal representatives, (*Panton* agt. *Hall*, *Carth.* 107;) but when *nihil* is returned the plaintiff may have a *scire facias* against the heir of the defendant, either alone or jointly with the tenants of the lands whereof the defendant was seized at the time of the judgment or at any time after.

By the revised statutes the writ of *scire facias* to obtain execution against the personal representatives of a party, must have been brought within one year after the cause for issuing the same arose. (2 *Rev., Stat.* 576, § 2.) The year began to run only from the time of the appointment and qualification of the personal representative, (*Clark* agt. *Sexton*, 23 *Wend.*, 479;) in which case it was held that a plea by the executor of the judgment debtor that the plaintiff did not cause the *scire facias* to be issued within the year, was a good bar to the writ. The revised statutes also prohibited the issuing of execution upon such judgment against the heir within the year, (2 *Rev., Stat.* 368, § 27,) and also prohibited any suit against heirs or devisees of any real estate, in order to charge them with the debts of the testator or intestate, within three years from the time of granting letters testamentary or of administration upon the estate. (2 *Rev., Stat.* 109, § 53.)

The Code has not changed the law in this respect. The personal estate must still be resorted to in the first instance. Instead of the writ of *scire facias* we now have the civil action, (*Code*, § 428,) or at the option of the judgment creditor the proceeding may be under the provisions of § 376 & 381, with no complaint other than the contents of the sum-

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mons to show cause, such summons containing the substance of the old writ of *scire facias*.

Observe that the Code in these provisions make the personal representatives liable to such summons within one year after their appointment, but the heirs, devisees, legatees and tenants of real property affected by the judgment and owned by them, after the expiration of three years from the time of granting letters testamentary or of administration.

An action which must be taken within one year against the personal representatives, and which cannot be taken until after that time against the heir, cannot combine both causes in the same suit. It is contrary to the statute and wholly ignores the fundamental rule, that the personalty must first be exhausted before the real estate can be charged with the decedent's debts.

Each defendant has stated, among the grounds of demurrer, that several causes of action have been improperly united, and that the one who is a personal representative has been sued jointly with the one who is an heir at law of the deceased judgment debtor.

This brings the case within the fifth sub-division of § 144 of the Code. Several causes of *scire facias* are several causes of action, for the proceeding by *scire facias* was an action always, and the remedies heretofore obtainable by that form of suit, may be obtained by civil action (*Code*, § 428,) although the old writ is abolished.

Can this action be divided into two actions under the last clause of § 172 of the Code, which says: "If the demurrer be allowed for the cause mentioned in the fifth subdivision of § 144 the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned." The answer must be in the negative, because this provision is intended for cases which by law may proceed simultaneously and separately, but not for cases where the statutes prohibit the one

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to be brought until the other is ended. Those statutes still remain in force, and this section of the Code was not designed to repeal them. Again, the executions which follow upon the revival of the judgment, are wholly different when they go against property held by personal representatives and property held by the heirs at law. Execution in the one case is commanded to be satisfied out of the goods and chattels of the deceased in the hands of the personal representatives to be administered, in the other case, out of the lands of the deceased held by the heirs. (2 *Rev. Stat.*, 363, § 3; 367, § 25, 27; *Code*, § 291, 468, 289, *sub. 2.*) The complaint against the heir should also describe the land sought to be charged, and the execution must contain a like description. (2 *Rev. Stat.*, 578, § 11, 454, § 44; *Code*, § 455.) The complaint in this case contains nothing of the kind. The provisions of the revised statutes not inconsistent with the Code are not repealed.

The appropriate remedy against the personal estate, where the action is not brought within the year, is in the surrogate's court; or if distribution has been made, against the next of kin or legatees who have shared in the distribution. (2 *Rev. Stat.*, 90, § 42.) The statutes make particular provision for all such cases. The order of liability is declared as to personal representatives, next of kin, legatees, heirs at law, tertenants and devisees, and each class subsequently liable may compel the holder of the demand to exhaust his remedies against those under a prior liability. (2 *Rev. Stat.*, 450, *art. 2*; *Mersereau agt. Ryerss*, 3 *Coms.*, 261; *Stuart agt. Kissam*, 11 *Barb.*, 271; *Butts agt. Genung*, 5 *Paige*, 254; *Schermerhorn agt. Barhydt*, 9 *Paige*, 23.)

Counsel have made no suggestions touching the necessity of a surrogate's order allowing execution to be issued either under the revised statutes as to the personal estate, or under chap. 295 of the laws of 1850 as to the realty, and nothing upon that subject has been considered.

The demurrer of each defendant is allowed with leave to plaintiff to amend as specified in the accompanying order.

Pitts agt. Pitta.

SUPREME COURT.

FRIEND PITTS *et al*, agt. JOHN PITTS *et al*.

- Where in an action for *divorce*, brought by the husband against the wife for adultery, it is proven that such act of adultery was in fact committed by the wife on a certain day, and it was also shown that subsequently the husband condoned such act of the wife by voluntary cohabitation, and for that cause his complaint was dismissed.

Held, that the fact of the commission of such adultery was no bar to a subsequent action by the wife for the recovery of her inchoate right of dower in her husband's real estate.

It is not adultery, which, of itself, can bar dower. It must be followed by a conviction in a suit for divorce by the husband, and such a conviction must be established by the final decree or judgment in the action. (*See 2 R. S. 146 §48.*)

New York Special Term, November 1st, 1872.

THIS was a motion to vacate an order directing the payment of certain moneys paid into court, being the value of the contingent inchoate right of dower of Rachel Ann Pitts, one of the defendants, and, the wife of John Pitts, another defendant in this action, which was commenced in January, 1870, for the partition of certain real estate in New York city. The decree was entered on the 24th day of March, 1870, and the report of sale was confirmed 8th July, 1870.

The said Rachel Ann Pitts refusing to execute a release of her contingent inchoate right of dower in the premises, the referee named in the decree was directed to ascertain the then present value of the said contingent inchoate right of dower upon the principles of life annuities, which was accordingly done, and found to amount to the sum of \$802 07. By consent of the parties, this sum was secured by the bond

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and mortgage of the purchaser to the referee named in the decree, on part of the premises sold, for the investment and benefit of the wife.

In April, 1869, the said John Pitts commenced an action in this court against his said wife for an absolute divorce upon the ground of adultery. The issues raised therein were referred to a referee to hear, try and determine, who rendered his report, bearing date October, 25th, 1871, whereby he reported that the defendant in said action had been guilty of an act of adultery on the 8th day of April, 1869, and that the plaintiff in said action had voluntary cohabited with his said wife with full knowledge of the act of adultery committed by her, and directed that the complaint in said action for a divorce be dismissed with costs. Upon said report judgment was entered on the 17th day of January, 1872, dismissing the said complaint, and for \$446 26 costs in favor of the wife and against the husband.

In August, 1872, the said Rachel Ann Pitts filed a petition in this court setting forth the above facts and praying that said sum of \$802 07 be paid over to her, upon which an order of reference was granted *ex parte* to take proof of the facts set forth in said petition. The report of the referee upon this petition was confirmed by an order of this court *ex parte* on the 4th day of September, 1872; and the referee named in the said decree was directed to call in and collect the said bond and mortgage and pay the same over to the petitioner or her attorney. Whereupon the said John Pitts obtained an order to show cause why the said order of September 4th, 1872, should not be vacated and set aside, and why the referee named in the said decree should not be directed to assign and transfer the said bond and mortgage to the said John Pitts with a stay of all proceedings in the meantime on the part of his said wife.

GARDINER, WARD & WAGSTAFF, *for motion.*

RICH'D L. H. FINCH, *opposed.*

Pitts agt. Pitts.

FANCHER, *J.*—This is a motion by John Pitts, a defendant, to vacate an order entered in this action on the 4th September, 1872, whereby a referee was directed to collect a mortgage and pay to Rachel Ann Pitts, another defendant (wife of said John Pitts), \$802 07-100, being the amount found due her according to the principles of life annuities for her contingent right of dower in the husband's share of the real estate described in the decree herein.

The ground on which the motion is made is that the wife has forfeited her dower by adultery.

It appears that the husband had brought an action for divorce against the wife prior to the judgment of partition herein, in which the referee found that the wife had been guilty of adultery on the 8th of April, 1869, which was prior to the commencement of this partition suit, and that the husband had condoned the offense by subsequent cohabitation with the wife, for which reason the complaint in the divorce action was dismissed.

The husband now moves to have the wife's allowance for right of dower set aside because of such offense.

It is contended by the learned counsel for the motion that the wife was "convicted of adultery" within the meaning of (2 *R. S.* 146, §48,) and thereby forfeited her right of dower. But I think the plain meaning of the statute is that she incurs the penalty of forfeiture of her dower when she is convicted of adultery by the decree or judgment of a competent court in a suit for divorce brought by the husband. It would put a strain upon the statute, which, by fair interpretation, it cannot bear, to construe it to mean some proof of adultery or anything less than a conviction of adultery by a decree or judgment.

It would be going too far to say, that such a conviction had been had whenever a referee has found that the adultery has been proved, though the husband had condoned the offense, and on the report of such facts the complaint of the husband had been dismissed.

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In such case I think there was no conviction of adultery, within the statute. This will be clear, if we refer to the course of enactments on the subject.

Under the statutes of (*Westm. 2, 13 Edw., I.*) adultery in the wife, accompanied with elopement, created a forfeiture of dower by way of penalty. But a reconciliation with the husband reinstated the wife in her right. That statute was re-enacted in New York in 1787, and it barred the wife of dower who eloped and lived with an adulterer, unless her husband was subsequently reconciled to her. Our revised statutes have abridged this ancient bar by confining it to cases of dissolution of the marriage contract for misconduct, and to cases of conviction of adultery in a suit for divorce brought by the husband. Elopement and adultery are no longer sufficient to bar dower, but there must be a conviction of adultery in a suit for divorce. It is said in the elementary works which treat of the subject that "a divorce *a vinculo matrimonii* bars the claim of dower. The reason is that the claimant must have been the wife at the death of the husband. The remark thus quoted was well employed by Blackstone, and other old writers, who wrote when the common law was in full vigor, and when unchanged by later statutory enactments. But the remark is not now universally true in our country, for the statutes of many of the States, have created new grounds of divorce *a vinculo*, which were unknown to the common law; and in such cases the right of dower can only be barred by express statutory enactment. (See *Wait agt. Wait*, 4 N. Y., 100).

There was no divorce *a vinculo* at common law for any cause arising subsequent to the marriage.

Not even adultery was a sufficient ground for a divorce *a vinculo* at common law, but only for a decree *a mensa et thora*. It is, therefore, plain that it is not adultery, which of itself can bar dower. It must be followed by a conviction in a suit for divorce by the husband; and such a con-

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viction must be established by the final decree or judgment in a proper action.

It follows that the wife was not barred of her right of dower in this case, and the motion must be denied.

Motion denied and stay of proceedings vacated.

Waring agt. United States Telegraph Company.

NEW YORK COMMON PLEAS.

RICHARD S. WARING and HENRY H. KING, *respondents*, agt.
THE UNITED STATES TELEGRAPH COMPANY, *appellant*.

Where the plaintiffs, previous to commencing their action against the defendant, a telegraph company, for damages in consequence of a negligent failure to send their message in time, write a letter to the defendant giving a detailed statement of their version of the facts upon which they claim damages, and such letter is not answered by the defendant, but is detained by it, without any answer, it is *not admissible on the trial as evidence* for the plaintiffs.

It would be preposterous to hold that all the facts stated in such a letter were admitted by the corporation, because the president, secretary, or some officer of the company, on an application for compensation for alleged damages, did not by letter deny the truth of them.

Inference from a party preserving a silence is considered a very dangerous kind of evidence, and is to be kept within very strict limits.

General Term, January, 1872.

Before DALY, C. J., LAWRENCE and J. F. DALY, J.J.

THIS is an appeal from a judgment entered on a verdict, and from an order denying a new trial on the judge's minutes.

The action was brought to recover damages from defendant's negligent failure to send two dispatches from Pittsburg to New York on the 17th December, 1864. The defendant answered that its omission to send the dispatches immediately after receiving them was caused by interruptions in the working of its lines, etc.

The defendant excepted on the trial to the admission of certain testimony, especially to the admission of certain letters which passed between the parties and to certain rulings

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of the court upon motions to dismiss, and to certain objectionable instructions and refusals of instructions to the jury.

GEORGE W. SOREN, *for appellant.*

I. It was error to receive in evidence the letters put in by plaintiffs.

1. The proposed testimony was not admissible on the ground suggested by the court, for the correspondence disclosed no express admission by defendant "as to the hour of receiving the dispatch," nor, indeed, of any fact alleged in plaintiffs' letters.

II. It can hardly be necessary to urge that the letters were not admissible on the grounds stated by plaintiffs' counsel. There is, however, very explicit authority against plaintiffs' proposition that the defendant was bound, as by an admission, because it "never questioned the facts" as alleged by the plaintiffs.

In such a case Lord TENTERDEN held, where plaintiff wrote a letter to defendant, which the latter did not answer, that plaintiff had no right to have the contents of the letter read at the trial as showing an admission from acquiescence. What was said to a man before his face, he was in some degree, called on to contradict, if he did not acquiesce in it; but it was too much to say that a man by omitting to answer a letter admitted the truth of the statements contained in it. (*Farlie agt. Denton*, 3 C. & P., 103; *Doe agt. Frankis*, 11 Ad. & E., 795.)

III. As to the further suggestions of the court that the letters might go to the jury as a part of the *res gestae*, an inspection of the correspondence will show that the ground was untenable.

(a.) In the first place there was neither "admission or denial" of any fact by the defendant. The defendant was entirely silent as to plaintiffs' allegations of facts.

(b.) The principle of *res gestae* did not apply to the matter

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in question at all. Plaintiffs' letter of March 13th, was their own version of their cause of action, made up partially of even heresay statements three months after the facts occurred.

IV. The recital of facts in the letter of March 13th, was an unsworn and *ex parte* statement of the very things which were set forth in the complaint, and which defendant, by joining issue, had challenged plaintiff to prove under oath, and under the scrutiny of a cross-examination, and within the just limitations prescribed by the rules of evidence.

(a.) Many of the alleged facts in favor of the plaintiffs, and very damaging facts to the defendant, were thus allowed to go to the jury without the formality of legal proof.

Thus plaintiffs were allowed to state that when S. T. Waring called at 2:40 o'clock he inquired whether the "previous dispatches" (both) had gone, and that defendant's clerk answered, yes. His testimony on the trial did not come up to that. Also that "Fulwood, defendant's manager, spoke up and said, yes, they have gone." He did not undertake under oath and swear to anything whatever of that sort.

V. But worse than this, and more detrimental and unjust to defendant, the admission of this evidence permitted the plaintiffs to place their unsworn statements before the jury with a criminating and very mischievous color.

See, for example, the statement that the operators' room was occupied only by "one small boy," who "did not appear able to answer promptly;" that finding him engaged in sending dispatches from the top of a pile of thirty or forty, Waring "found his first two dispatches at the very bottom of the pile, the third and last being the only one which had been sent."

As to the "third and last dispatch," defendant had not undertaken to send it all. Plaintiffs sent it by Western Union line, as their own witness testifies on the trial. The imputation of carelessness and lack of method in our office on this particular ground, was therefore, unfounded and unjust.

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As examples of the same coloring of evidence, note the allegations, that "the 2,000 barrels would have been sold at 81 and 82 cents, but for the gross negligence of the employees of your company, in either not at once sending, or declaring their inability to send immediately, our dispatches." Here the plaintiffs were permitted to testify not only all the facts, but all the law which was essential to their recovery.

VI. But the plaintiffs were suffered not only to state facts, which, if they had been adduced in the regular way might have been admissible, but to put before the jury entirely incompetent matter, the natural and designed effect of which, however, was to put the defendant in a more odious and embarrassing position than any admissible evidence could have done.

See the letter of June 14th, 1865, followed up by that of the defendant, enclosing the opinion of its counsel, against paying the claim.

VII. The suffering all this *ex parte* unsworn, argumentative, and incriminating matter to go to the jury under the express sanction of the court, against the strenuous objections of defendant's counsel, without any qualification, either at the time of receiving it, or on the charge, was grossly unfair to defendant. It was entitled eminently in such a case, to a trial upon sworn testimony as to bald facts, and not upon unverified allegations covering everything essential to plaintiffs' case, and pressed to the jury with explicit charges of gross negligence and unfair dealing on the part of the defendant.

VIII. In a case of far less irregularity than this, the Court reversed a judgment against defendant and granted a new trial, because a witness for the plaintiff had been permitted to testify both orally, and by production of a letter from one O'Brien, which was received in evidence, that O'Brien, to whom the missing despatch had been directed, did not buy the stock ordered, though advised of the contents of the telegram by letter, because the telegram itself had failed to

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reach him. At *fol.* 160 is just such an objectionable declaration of third persons, namely, that Macy & Sons could easily have sold plaintiffs' oil at the highest price claimed, if the telegram had been received in time. (*Wenger agt. U. S. Tel. Co., 53 Penn., 262.*)

IX. It is no good answer to the objections now made to this part of the evidence, that some of the statements which it contains were put in evidence on the trial. It is fatal error that such evidence went in at all in this way. And the worst of it plaintiffs did not undertake to prove in any other way.

F. F. MARBURY, JR., and JOSEPH H. CHOATE, *for respondents.*

Extract from respondents' points.—And this is the only passage relating to the point on which the appeal was argued.

“*Fifth.*—The numerous exceptions taken by the defendant upon the admission or exclusion of testimony will all be found immaterial.

“The direct correspondence between the parties before suit brought in respect to the claim and the facts out of which it arose was properly received. Such correspondence is always material as pertinent to the issues of fact to be determined. As a statement by the one party in relation to the same, with the admissions, denials, or modifications expressed or implied in the replies or failures to reply on the other.”

By the court, DALY, C. J.—The defendants rest their application for a new trial upon one ground solely, that it was an error on the part of the court to allow the letters which had passed between the 13th of March and the 19th of September, 1865, to be used as evidence in the cause and the plaintiffs have furnished no answer to it. The correspon-

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dence was objected to as irrelevant, and it certainly was, as it took place after the cause of action had arisen, and had relation to the settlement of the plaintiffs' claim, without suit.

The first letter of March 13th is an elaborate statement in narrative form on the part of the plaintiffs of the facts and circumstances relied on by them as showing that they were entitled to recover from the company the sum of \$9,880 23, and was written with a view of being laid before the board of directors of the company. The next was a letter of the plaintiffs asking what decision had been arrived at by the company, and was followed by a brief answer from the president that the subject of the claim had been referred to their legal adviser. This was followed by a letter of the plaintiffs complaining of the course that had been taken, and asking what conclusion the counsel had come to. The remaining part of the correspondence consists of further letters of the plaintiffs wishing to know whether the defendants had concluded to refuse to pay the claim, and further letters from the president apologizing for the delay and finally transmitting the written opinion of the company's counsel, which was adverse to the plaintiffs' claim.

This correspondence was not, it would seem from the judges remark, admitted as of any materiality in itself. He said that if it contained admissions as to the hour of receiving the despatch, he thought it proper that it should go to the jury: that where the fact was material to the issue, the operation of it and its denial or admission in a subsequent letter, he would allow to go to the jury as a part of the *res gestae*.

The letter of the plaintiffs with which this correspondence opened, did contain a statement of the exact time when the despatch was left at the company's office to wit, the 17th of December 1864, at ten minutes past twelve o'clock P. M. There was no admission or denial of this or of any of the facts consecutively detailed in the first letter written by the

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plaintiffs, unless the omission of the company or of any of its officers to deny formally by letter what was contained in the plaintiffs letter to the president, is to be construed into an admission of everything that was stated in that letter, which would be carrying the rule respecting admission to an unwarrantable extent. "What is said to a man to his face," said Lord TENTERDEN in (*Fairlie agt. Denton, 3 Car. & P., 103*), he is in some degree called upon to contradict if he does not acquiesce in it; but the answering of a letter is quite different, and it is too much to say that a man by not answering a letter at all events admits the truth of the statements that letter contains." In the present case a party having a claim against a corporation, writes a letter to its principal officer, giving a detailed statement of all the facts upon which the claim is founded that it may be laid before the board of directors in the expectation that it will satisfy them of the liability of the corporation and that they will direct it to be paid, and is officially answered by the secretary of the company, that the subject of the claim has been referred to their legal adviser, and after some time has intervened, the president transmitting the written statement of the counsel, that in his opinion the company have a good defense and that he advises against paying the claim. There is nothing in this that can be regarded as an admission of the fact contained in the plaintiffs letter, which would entitle it to be used as evidence to prove these facts. It would be preposterous to hold that all the facts stated in it were admitted by the corporation, because the president secretary or some officer of the company on an application for compensation for alleged damages, did not by letter deny the truth of them. Even admission inferred from acquiescence in verbal statement made in a parties presence are received only when the declaration or statement made, is of a kind which calls for immediate contradiction, or is such as would naturally provoke or lead to some action or reply on the part of the person to whom or in respect to whom it is made;

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because inference from a party preserving a silence is considered a very dangerous kind of evidence, and is to be kept within very strict limits (*Child* agt. *Grace*, 3 C. & P., 193; 14 *Serg. & R.*, 393; 1 *Greenleaf Evid.*, 199).

It was not essential to resort to the correspondence, to prove the time when the first message had been delivered, for the plaintiffs' witness, King, had already testified that he left the message at ten minutes after twelve o'clock P. M. by the clock on the wall of the telegraph company, and identified as his, an entry on the message to that effect, made at the time, and that he stated to the person that was there (the witness Fullwood) the hour as indicated by the clock, and explained to him how necessary it was that the message should reach New York by one o'clock.

Now the witness Fullwood testified that he had no recollection of receiving the message from King or of having had any conversation with him that day, and the person whose duty it was to receive messages, the witness Fulton testified that he received it at fifteen minutes after twelve o'clock M.; that he noted the time in a book, and took it from a clock in the office.

The judge regarded the time when the dispatch was received as material to the issue, and it certainly was, for there was conflict upon that point between plaintiffs and defendants' witnesses, and conflict also in respect to what subsequently occurred throughout that day.

The letter of the plaintiffs, which the judge admitted, not only corroborates the statement of the witness King as to the exact time, but also the testimony of both King and Waring (the plaintiffs), in respect to other matters, during the day, occurring between them and the defendants' employees, and also contained statements of facts which neither of them had testified to. Now being received as an admission on the part of the defendants, it is impossible to say what effect it may have had upon the jury. It was an action for negligence, and the judge left it to the jury to say whether the messages failed

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to reach their destination, because of the misconduct and negligence of the defendants' agents.

If the facts were as set forth in plaintiffs' letter, it was a very plain case of negligence, and the jury, for all we know, may have treated what was stated in the letter as admitted by defendants, because there was no denial of it on their part by letter. Some very material things bearing on the question of negligence were stated in this letter, and were not verified by the plaintiffs' witnesses, one of which will suffice.

The letter states that when the second message was delivered at the office by Temple at 12:45 o'clock P.M. he inquired if the previous dispatch had gone forward, and that the clerk at the counter answered, "yes;" and Fullwood, the manager, "yes, they have gone," which, if they had so stated, was untrue, and calculated to mislead the plaintiffs. But Temple, when summoned as a witness, gave all the conversation that took place at the telegraph office that he could remember, and says nothing about his having made this inquiry. The fact was material for the plaintiffs' witness, Waring, fixed the time of the sending of the second message at about fifteen minutes past one o'clock, and at that time Fullwood was not in the office, for he went to his dinner at half-past one o'clock, and the letter and the testimony of Waring together were to the effect that the plaintiffs' agent was told that the two first messages had been sent to New York. The plaintiff King testified that if Fullwood had not answered when they sent to the telegraph office at 2:30, "your two dispatches are gone," if he had not made that misrepresentation he, the witness, would have taken the two dispatches and sent them with the third at 2:30 as sales could then be effected in New York before five o'clock. Now, Fullwood had no recollection of saying this, and, in reply to a juror, testified that the general course when the line was down was to say when a message came, "we can not put yours through; go to another line;" so that the fact whether he made the misrepresentation or not in respect to the two first

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messages, was a very material question in the case. Indeed, King testified that if they had got two dispatches when they took the third to the other office they would have effected the sale.

The defendant's operator testified that it was a cloudy, wet and gloomy day; that the wires were in working order until half-past 11 o'clock A.M., when the last message was sent by him, and were interrupted from that time until half-past three o'clock in the afternoon, when the next message was sent, and that they continued in order until nine o'clock in the evening; that when the interruption was temporary it was customary to receive messages, but that when the derangement was serious and likely to cause considerable delay it was customary to inform customers of the fact when offering their messages.

The point in the case was, therefore, whether the defendant's agent had been advised of the importance of the immediate transmission of the plaintiffs two first messages and had prevented the plaintiffs from sending them by the other lines in time to effect the sale in New York, by representing that they had been sent, when it was not the fact.

The two witnesses of the defendant, Fullwood and Fulton, one the general manager, and the other the clerk who received messages, had no recollection of any such statement being made to them or by them, as the witnesses King, Temple and O. T. Waring testified to. The first message was left, according to the defendants' witnesses, at fifteen minutes past twelve o'clock, and the second at half-past one, and the line had ceased working for two hours, when the second message was received.

It is suggested that there is evidence uncontradicted in the case sufficient to warrant the verdict as matter of law, but I do not think that we can assume this. The testimony of Fullwood and Fulton was generally loose, and, as it strikes us, unsatisfactory. But the weight or value to be attached to it was for the jury, and the judge, very properly, left the

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case upon the whole evidence to them. The plaintiffs' letter, as a statement of facts, was stronger than the other evidence which the plaintiffs gave upon the trial, and, as the defendants' counsel has argued upon this matter, there is a "color" about it that gives a very strong and decided impression of very culpable negligence on the part of the defendant, or rather of their agent. We can not say that the jury were not influenced by it, but it could not, by any possibility, have affected the verdict; and where such is the case, the only safe course is to order a new trial. (*Gillett agt. Mead*, 7 *Wend.*, 193; *Benjamin agt. Smith*, 12 *Id.*, 404; *Clark agt. Vorce*, 19 *Id.*, 232; *Williams agt. Fitch*, 18 *N. Y.*, 546; *Anthoine agt. Coit*, 2 *Hall*, 40; *Underhill agt. N. Y. & H.R.R. Co.*, 21 *Barb.*, 496-7; *Clark agt. Crandall*, 3 *Barb.*, 613.)

Judgment reversed and new trial ordered.

LARREMORE and J. F. DALY, *JJ.*, concurring.

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SUPREME COURT.

STEPHEN D. CORAY, respondent, agt. JOSEPH H. MATHEWSON,
appellant.

A purchaser in possession of real estate, under a contract to purchase, cannot surrender possession in order to rescind the contract.

Neglecting to rescind, and yet retaining the possession, he cannot be permitted to insist upon the vendor's breach of the contract to deliver a title called for under it, as a defense to the vendor's action for a specific performance, if the vendor is able at the trial to make such a title to the premises as the purchaser is entitled to receive under the contract.

Nor can a purchaser retaining possession, successfully resist the payment of the purchase money.

On the 18th of March, 1870, the plaintiff and defendant entered into a contract under their hands and seals, wherein and whereby the plaintiff covenanted and agreed to and with the defendant, to sell and convey to him certain lands in the town of Almond, in the county of Allegany, containing about 315 acres of land, and to procure a search of record showing title free of all incumbrances, by the 1st of May then next, and upon the performance of the conditions in said contract to be performed by the defendant, he would convey said premises to him, by a full covenant warranty deed, on said 1st day of May.

The defendant, on his part, covenanted and agreed to and with the plaintiff to pay for said land the sum of \$6,000 in eight equal annual payments on and after the 1st of April, 1871, and to pay all taxes and assessments thereafter imposed upon said land. The defendant went into possession under the agreement on the 1st of May, 1870, and held possession at the time of the trial of this cause.

About the 17th October, 1870, plaintiff presented to the defendant a search made by the clerk of Allegany county, by which it appeared that the premises in question were conveyed by several mesne conveyances duly recorded from 1st of July, 1847, to March, 1860, when one Opp and wife conveyed to Charles L. Flint, which deed was duly recorded, but no deed was found upon record from Flint to any person, but a mortgage was found upon record upon said premises from one Sarah Arndt and her husband to said Flint, dated March 28, 1861, in which mortgage it was stated that the lands therein described were the same conveyed by said party of the second part to said Sarah Arndt, by deed bearing even date herewith. This mortgage was subsequently foreclosed.

This search, after examination by defendant's counsel, was returned with an objection on account of the absence of evidence of any conveyance to Arndt.

Before the commencement of this action plaintiff prepared and tendered a deed of said premises to the defendant, which he refused to accept and perform the contract on his part; and on the 20th December, 1870, this action was commenced to

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compel a specific performance by defendant of said agreement, or to surrender possession and account for the rents and profits.

On the trial it was proved on behalf of the plaintiff that the several grantees named in the deeds mentioned in the search, entered and occupied under them from 1847 down. That as early as April or May, 1870. the defendant knew that the deed from Flint to Arndt was not recorded.

Mrs. Arndt was sworn, and testified that she had seen the deed from Flint to her; that it was burned up some three or five years after she gave the mortgage. It was acknowledged, and was from Flint to her; she did not recollect whether Flint's wife signed with the deed; the best of her knowledge was she did.

The court below ordered judgment that the defendant specifically perform the contract on his part. Defendant appealed.

Held, that the search which plaintiff was to furnish was required to show that the plaintiff's title was *free from all incumbrances*, and such was the intention of the parties by the provisions of the agreement.

Held, also, that the defendant is, by his contract, entitled to a *title of record*, and if the evidence fall short of establishing such a title, he is not bound to accept it unless he has estopped himself from insisting on such a title.

There is nothing shown in this case that the title in Mrs. Arndt was a legal unincumbered title. It was proved that Flint had a wife, and the only evidence that she united in the deed is the uncertain and unreliable recollections of Mrs. Arndt as to an event occurring more than ten years before the trial. What is to prevent Mrs. Flint from asserting, should she survive her husband, her right of dower in said premises?

The court will not compel the defendant to take a title which is *prima facie* defective and which he may not be able to sustain in an action brought to annul it.

Mrs. Flint was not a party to the foreclosure of the mortgage given to Flint by Mrs. Arndt, and she was not bound by the judgment in that action. The recital in Mrs. Arndt's mortgage of the conveyance by Flint to her may bind Flint, he is also bound by the judgment of foreclosure of that mortgage; but the difficulty as to his wife's title is not obviated by either. The defendant ought not to be compelled to accept such a title.

Held, that the taking and retaining possession of the premises by the defendant does not *estop him from disputing the plaintiff's title*.

Where the defect in the title is such as necessarily to lessen the value of the property it would not be held waived except upon the most conclusive evidence that it was his intention to do so.

Fourth Judicial Department. Submitted at Rochester, March, 1872. Decided at Oswego, May, 1872.

Before MULLIN, P. J., JOINSON and TALCOTT, JJ.

On the 18th of March, 1870, the plaintiff and defendant entered into a contract under their hands and seals, wherein and whereby the plaintiff consented and agreed to and with the defendant to sell and convey to him certain lands in the town of Almond, in the county of Allegany, containing about 315 acres of land, and to procure a search of record showing

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title free of all incumbrances by the first of May then next, and upon performance of the conditions in said contract to be performed by this defendant, he would convey said premises to him by a full covenant warranty deed on said first day of May.

The defendant, on his part, covenanted and agreed to and with the said plaintiff to pay for said land the sum of \$6,000 in eight equal annual payments, the first to be made on the first of April, 1871, and the remaining payments annually thereafter. He was also to pay all taxes and assessments thereafter imposed upon said land.

It was mutually agreed that the defendant should have possession on the 1st of April, 1870, and that he should keep the same in good repair, &c. That if defendant should fail to perform said contract the plaintiff might declare it void, retain whatever might be paid upon it and all improvements, and might consider defendant as his tenant, holding over without permission, and take immediate possession, and remove defendant therefrom.

On or about the 1st day of May, 1870, the defendant went into possession of said premises, and was in possession thereof at the time of the trial of the cause.

About the 17th October, 1870, plaintiff presented to the defendant a search made by the clerk of Allegany county, by which it appeared that the premises in question were conveyed by Masterton Ure and others to Paul Goddard, by deed dated the 1st of July, 1847, and which was duly recorded 9th January, 1852, in liber 34 of deeds, page 201, in the clerk's office of said county.

In April, 1859, Paul Goddard and wife conveyed the same premises to Edward J. Opp, which deed was duly recorded.

In March, 1860, Opp and wife conveyed to Charles L. Flint, this deed was duly recorded.

No deed is found upon record from Flint to any person, but there is found a mortgage from Sarah Arndt and her husband to said Flint upon the said premises,—the con-

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sideration of which is stated to be \$5,000. It is dated March 28th, 1861 and was duly recorded May 17th, 1861, in liber 23 of mortgages, page 172. It is stated in the mortgage, that the lands in this instrument descended being the same conveyed by said party of the second part to said Sarah Arndt, by deed bearing even date herewith.

The search showed a mortgage given by the plaintiff and wife to Jesse B. Gibbs, bearing date January 21, 1869, recorded January 27, 1869, in liber 32 of mortgages, which was a subsisting lien on said premises.

This search was left with defendant for some time, for the purpose of examination by counsel. It was finally returned with an objection, on account of the absence of evidence of any conveyance to Arndt, and also because of the last mentioned mortgage.

Plaintiff procured a satisfaction piece of said mortgage, and annexed it to the search, and left it with one Brown, giving defendant notice that he could examine it while in Brown's possession, but he could not take it away.

Before the commencement of this action plaintiff prepared and tendered a deed of said premises to the defendant, which he refused to accept, and perform the contract on his part, and on the 20th of December, 1870, this action was commenced to compel the defendant to specifically perform said agreement, or to surrender possession, and account for the rents and profits.

On the trial it was proved on the part of the plaintiff, that the several grantees named in the deeds mentioned in the search, entered and occupied under them from 1847 down.

That as early as April or May 1870, the defendant knew that the deed from Flint to Arndt, was not recorded.

Mrs. Arndt was sworn, and testified that she had seen the deed from Flint to her, that it was burned up, some three to five years after she gave the mortgage. It was acknowledged and was from Flint to her, she did not recollect whether

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Flint's wife signed the deed—the best of her knowledge was she did.

The court below ordered judgment, that the defendant specifically perform the contract on his part, and from that judgment the defendant appeals.

BEMIS & NEAR, *for appellants.*

HAKES & STEVENS, *for respondent.*

By the Court, MULLIN, P. J.—Upon the failure of the plaintiff to deliver a search showing his title to the land free from incumbrance, the defendant might have rescinded the contract. In order to rescind he must have surrendered the possession. (*More agt. Smedburgh, 8 Paige, 600.*)

Neglecting to rescind and yet retaining the possession, he cannot be permitted to insist upon the plaintiff's breach of the contract to deliver the search as a defense to his action for specific performance, if the plaintiff was able at the trial, to make such a title to the premises as the defendant is entitled to receive under the contract. (1 *Hilliard on Vendors*, 193, 221; 2 *Ib.* 279.) Nor could a purchaser retaining possession successfully resist the payment of the purchase money. (*Wright agt. Delafield, 23 Barb., 498.*)

Before proceeding to inquire whether the plaintiff has shown such a title, as the defendant is under the circumstances of the case bound to receive, it is necessary to ascertain what sort of title the defendant is entitled to, under his contract, and to what extent, if any, the contract has been controlled or modified by the acts of the parties under it.

The search which plaintiff was to furnish was required to show that the plaintiff's title was free from all incumbrances.

The parties must have intended by this provision that the title should be free from all incumbrances, as the search could not truthfully show the title unincumbered, it was not so in fact.

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The plaintiff by his covenant was to execute and deliver to the defendant *a full covenant warranty deed*, one of the covenants in such a deed is that the premises conveyed are free from incumbrances.

When the contract between the parties to sell land, and there is no specification of the extent or nature of the title, that is to be conveyed, the vendor must convey a good unincumbered title—(1 *Hilliard on Vendors* 208, 9,) So a covenant to give a good and sufficient deed of conveyance free of all incumbrances binds the party to give a deed which passes the title.

If the vendor cannot make such a title the purchaser may return back the purchase money with interest (1 *Hilliard*, 209).

The same author says (on page 210) that where one contracts to purchase on the faith of the vendor's having a good title, he has a right to have the title sifted to the bottom before he can be called on either to accept an indemnity or compensation for a defect, or to abandon the contract, as equity will not compel a purchaser to take a doubtful title.

In *Fry on Specific Performance*, 347, it is said: when the vendor sues the purchaser for a specific performance of the contract, the defendant is entitled to have the plaintiffs' bill dismissed if it appear that the plaintiff cannot make out to the land a title free from reasonable doubt. (See also note 1 to same page, also note 2 page 349.)

At page 350 the same author says, the court will never compel a purchaser to take a title, when the point on which it depends is too doubtful to be settled without litigation, or when the purchase would expose him to such proceedings. The court will not compel him to buy a lawsuit.

Let us now inquire whether the title established by the plaintiff from the record by the recitals in the conveyances, under which he acquired title, and by the parol proof given on the trial has established such a title as the court should require the defendant to accept.

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The defect in the title being the absence of a deed from Flint to Arndt, and the failure to record that deed would be obviated if its existence is legally formed, as, if shown to exist, it could be recorded, and thus the title of the plaintiff made complete on the record.

The defendant is by his contract entitled to a title of record, and if the evidence falls short of establishing such a title he is not bound to accept it, unless he has estopped himself from insisting on such a title.

Every person who has had anything to do with conveying must be aware of the importance to persons desiring to sell land to be able to show a perfect title of record. Such a title is not only the most satisfactory, but to those not acquainted with the law, the only one, they will or can safely receive.

A title is very largely depreciated that can only be established by a resort to evidence *aliunde* the record.

The provisions in the contract for a perfect title on the record was a very important one to the defendant, and the court cannot altogether disregard it.

The law furnishes no means to establish the execution or contents of the deed from Flint to Arndt except by perpetuating the evidence of the parties to that deed to be used whenever litigation arises. A suit by the defendant may be indispensable; but even a suit will not perfect his title on the record.

The court below has held that conveyance to Mrs. Arndt was established conclusively by the evidence of Mrs. Arndt alone, while, for aught appearing in the case, the rights of third persons may have intervened, and which may at some future day be asserted, to the premises.

It is enough that there is nothing shown in this case that the title in Mrs. Arndt was a legal unincumbered title.

It was proved that Flint had a wife, and the only evidence that she united in the deed is the uncertain and unreliable recollection of Mrs. A. as to an event occurring more than

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ten years before the trial. What is to prevent Mrs. Flint from asserting, should she survive her husband, her right to dower in said premises.

The court will not compel the defendant to take a title which is *prima facie* defective, and which he may not be able to sustain in an action brought to annul it. It was held in *Seymour agt. Delany*, (*Hopk.*, 436), that equity could not compel a purchaser to take a doubtful title. But the purchaser will not be relieved when there is only a bare possibility that the title may be affected by existing causes provided the highest evidence of which the nature of the case admits, and amounting to a moral certainty be given that no such causes exist. (*Schermerhorn agt. Niblo*, 2 *Bosw.* 161; *Miller agt. Macomb*, 26 *Wend.*, 229.)

What protection would defendant have against Mrs. Flint, should she sue for dower? The judgment in this case would be of no avail against her; she is not a party to it, and yet the recollection of Mrs. A. that Mrs. Flint was a party to the deed to her, has been held sufficient evidence of a transfer of her title to bind her. If such was not the effect of the evidence and of the judgment founded on it, the defect in the title remains.

Mrs. F. was not a party to the foreclosure of the mortgage given to Flint by Mrs. A., and she is not bound by the judgment in that action.

The recital in Mrs. A.'s mortgage of the conveyance by Flint to her, may bind Flint, he is bound also by the judgment of foreclosure of that mortgage; but the difficulty as to his wife's title is not obviated by either. The defendant ought not to be compelled to accept such a title.

It only remains to inquire whether taking and retaining possession by the defendant estops him from disputing the plaintiff's title.

It has been repeatedly said that a purchaser who takes and retains possession of lands under a contract of purchase is estopped from alleging a defect in the vendor's title. (1

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Hilliard on Vendors, 21-223; *Veil* agt. *Troy, &c., R.R. Co.*, 20 N. Y., 184.)

But the proposition thus broadly stated is not supported by any adjudged case that I have been able to find.

Possession will estop a purchaser from taking advantage of the strict performance by the vendor of his covenant to convey at the time specified in the contract and from successfully resisting the payment of the purchase money. (*Wright* agt. *Delafield*, *supra*; 1st *Hilliard on Vendors*, 221; *Veil* agt. *Troy, &c., R.R. Co.*, *supra*; *Tompkins* agt. *Hiatt*, 28 N. Y., 347; *Hill* agt. *Hill*, 4 *Barb.*, 419; *Lewis* agt. *McMillen*, 41 *Barb.*, 420.)

And when he enters into possession under the contract, knowing that there is a slight defect in the vendor's title or a slight incumbrance upon it, he will be held to have waived it. *Same*, 223, 224. *Ten Broeck* agt. *Livingston*, 1 *J.C.R.*, 357; *Winne* agt. *Reynolds*, 6 *Paige*, 407.)

But when the defect in the title is such as necessarily to lessen the value of the property, it would not be held waived except upon the most conclusive evidence that it was his intention so to do.

This is the conclusion necessarily drawn from the opinion of the master of the rolls in *King* agt. *King*, (1 *Mylne & Keene*, 442.)

The defendant, the purchaser, had been in possession for eight years under a contract for the purchase of certain premises, to which the vendor could not make a good title, yet he had refused to surrender its possession, or to take such title as the vendor could give. The bill was filed by the latter to compel a surrender of the contract, or that defendant accept the title.

The master of the rolls directed the surrender of the agreement and an account for the rents and profits.

The case is substantially the same in principle as the one before us; yet eight years possession did not estop the defendant from insisting on the defect of title, and the relief

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granted fully protected the vendor and did no injustice to the purchaser.

In *Burroughs* agt. *Oakley*, (3 *Swanst*, 159), a purchaser was held entitled to an investigation of the title notwithstanding possession taken, acts of ownership incident to possession, and preparation for a conveyance. (1 *Hilliard on Vendors*, 227, 228.)

In *Minor* agt. *Edwards*, (12 *Mis.*, 137), the agreement was to pay for the land, on the vendor making a clear title in fee simple. The deed delivered did convey in fee, but there was an incumbrance unknown to the purchaser. Held, the latter might waive his right to a deed in fee and accept a lesser interest; that whether there was such a waiver was a question for the court, and there must be unequivocal proof of it.

The most that can be claimed against a purchaser by reason of taking and retaining possession of land under a contract of purchase is, that it is evidence of a waiver of objection to the title, but whether it shall estop him depends on the circumstances of the case.

In *Fox* agt. *Burch*, (1 *Merivale*, 105), the defendant went into possession of premises, to which the vendor covenanted to make title by a day named, and on payment of the price to convey, the abstract showed a valid title. The bill prayed specific performance, or that the defendant surrender possession and account for the rent, &c.

The answer admitted the agreement, claimed possession under a prior parol agreement, and that he took exceptions to the title as disclosed in the abstract, and they had not been removed, and that he insisted on a performance by the plaintiff.

The Lord Chancellor said, that although in the ordinary case of a purchaser being let into possession, he must be taken to have waived, or to have given reason to expect that he will waive objections to the title, yet there is another class of cases in which the purchaser gets into pos-

Coray agt. Mathewson.

session by the courtesy of the vendor, when it must depend on the particular circumstances of each case, whether he shall be compelled to pay the purchase money before the completion of the title. In the present case, it was not denied there was a degree of laches on the part of the vendor in making out his title, and on these grounds the motion was denied and an order of reference ordered to inquire as to the title.

The court finds that the defendant knew as early as May or April of the defect in plaintiff's title.

This defect was not discovered until after the contract was completed by which the rights of the parties was fixed. It cannot be said that defendant purchased with knowledge of the defect, and is not estopped on that ground from insisting on the defect.

It is not certain whether defendant went into possession with knowledge of the defect in the title.

By the contract he was to have possession on the first of April 1870, but the finding is, he entered on or about the first of May, and that he had notice of the defect in April or May.

This finding is too uncertain to justify the court in giving any considerable importance to the notice.

Should the defendant succeed on the next trial of this cause, the judgment should contain a provision declaring the contract between the parties null and void, thus enabling the plaintiff to maintain ejectment for the land, and in such action to recover the rents and profits for the time defendant has been in possession.

For these reasons, I am of opinion that the judgment of the special term should be reversed, a new trial granted; costs to abide the event.

JOHNSON J. dissents.

Sickle agt. Marsh.

SUPREME COURT.

JOSEPH W. SICKLE *et al*, agt. PELATIAH J. MARSH *et al*.

The defendants, on the 25th of April 1870, at Troy, N. Y., wrote to Messrs Allen & Co. of New York, plaintiffs, a letter, of which the following is a copy: "Troy, April 25, 1870. Messrs Allen & Co. New York. Gents. The bearer, Mr. Leonard Wager, Troy, N. Y., is going to start a pedling route to sell cigars and tobacco. He wishes to buy his goods of your firm, if you will give him a liberal credit. We, the undersigned, will be his security to the amount of \$1,000. Signed, T. S. BANKER, P. J. MARSH."

Wager, between April 26, 1870, and August 12, 1870, purchased of plaintiffs, at different days, cigars and tobacco, amounting in all to \$2,178.55. The first sale amounted to \$786.78, and on several different days during said term paid on account sums of money amounting in all to \$1,412.28. At no time did his indebtedness exceed \$1,000. The unpaid balance for which this action was brought was \$766.27, due on average time, Sept. 12, 1870.

Held, that this letter was a *continuing guaranty*, and rendered the defendants liable until notice to the contrary.

Rensselaer Circuit, Feb., 1872.

ACTION tried without a jury.

A. B. PARMENTER, *for plaintiff*.COWEN & BOIES, *for defendants*.

On the 25th of April, 1870, the defendant, Marsh, and one Banker, now deceased, (for whom his executrix has been substituted,) wrote a letter; of which the following is a copy:

"TROY, April 25, 1870.

"Messrs. Allen & Co., New York. Gents. The bearer, Mr. Leonard Wager, Troy, N. Y., is going to start a pedling

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route to sell cigars and tobacco. He wishes to buy his goods of your firm if you will give him a liberal credit. We, the undersigned, will be his security to the amount of one thousand dollars.

“Signed, T. S. BANKER
“P. J. MARSH.”

This was, by Marsh and Banker, delivered to Leonard Wager and by him taken to New York and on the following day delivered to the plaintiffs, composing the firm of Allen & Co. It was at that time stated to them that Wager had no means, and that Marsh and Banker were good.

On the 26th day of April, 1870, and on several days afterward, the last being Aug. 12, 1870, the plaintiffs sold to Wager, cigars and tobacco amounting in all to \$2,178.55. The first sale amounted to \$786.78. On the 13th day of May, 1870 and on several days afterward, the last being Aug. 11, 1870, Wager paid on account, sums of money varying from \$100 to about \$240; and amounting in all to \$1,412.28. At no time did his indebtedness exceed \$1000. The unpaid balance is \$766.27; which, by average, was payable Sept. 12, 1870 and this the plaintiffs seek to recover. The question is whether the paper was a continuing guaranty.

LEARNED, J.—The principle is settled that instruments of this kind are to have a liberal construction. “If the language is ambiguous, and admits of two fair interpretations, and the guarantæe has advanced his money on the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor.” (*Lawrence agt. McCalmont*, 2 *How. U. S.*, 426.) It is true that, when the meaning of the guaranty is ascertained, the liability of the guarantor is not to be extended by implication. This is what is meant by saying that a guaranty is *strictissimi juris*. (*Dobbin agt. Bradley*, 17 *Wend.* 422.)

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But where the question is as to the meaning of the written language, there is no difference between the contract of a surety and that of any other party. The rule that the words of an instrument are to be taken most strongly against the party who signed it, applies to guaranties. (*Mason* agt. *Pritchard*, 12 *East.*, 227; *Gates* agt. *McKee*, 13 *N. Y.*, 232; *Douglas* agt. *Reynolds*, 7 *Peters*, 113.

Now in construing this paper it must be remembered that the guarantors, by notice to the guarantees, could at any time prevent the incurring of any further liability.

The paper shows that Wager was about to carry on a business, and that his purchases were not to be for his private use. The defendants lay stress on the word "start," and insist that it was only for the first purchases that the credit was to be given. They say that after Wager had once purchased goods to the amount of \$1,000 he could pay cash for his future purchases out of his sales.

But starting a pedling route certainly implies carrying it on. Wager was to buy "his goods," which means the goods he would use in the business. And it is hardly to be expected that out of the profits of the sales he could keep up his stock and also pay off his first purchases.

The defendants cite *Fellows* agt. *Prentice* (3 *Denio*, 512). But this case in the supreme court was decided on the ground that the plaintiff had extended the time of the purchase and had thus discharged the guarantor. And this seems to have been the only point decided in the court of errors. An examination will show that the head note on the subject of continuing guarantees is not sustained by the case.

The two other cases of *Whitney* agt. *Groot* (14 *Wend.*, 82), and *Rogers* agt. *Warren* (8 *Johns.*, 119), have this difference from the present, that no limit to the amount of credit to be given was named.

The language of this guaranty is that the \$1,000 is the

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limit of the security, not of the purchases. And it seems to me that the reasonable construction is that the guaranty continued until notice to the contrary. This is sustained by *Gates* agt. *McKee*, (13 N. Y., 232,) and *Rindge* agt. *Judson*, (24 N. Y., 64.)

Decision for plaintiffs.

Town of Rochester agt. Davis.

SUPREME COURT.

THE TOWN OF ROCHESTER agt. JACOB DAVIS *et al.*

An *injunction pendente lite* will issue to restrain town officers from the issuing of bonds of the town for railroad purposes where it is alleged that the town had no authority to create such bonds by reason of a defect in the petition of the tax payers of the town. The county clerk's certificate is not conclusive evidence of such authority.

*Albany Special Term, July, 1872.*WESTBROOK & CANTINE, *for plaintiffs.*GROO & LYON, *for defendants.*

LEARNED, J.—This action is brought to restrain the issue and negotiation by the defendants, Davis and others, of certain bonds of the plaintiffs about to be issued under so-called bonding acts in aid of the N. Y. & O. Midland R. R. Co., and the plaintiffs now move for an *injunction pendente lite*

I fully agree with the counsel for the defendants that *injunctions pendente lite* should be granted cautiously and only when necessity appears. Where, for instance, such an *injunction* would prevent a defendant from exercising what would ordinarily be a vested and personal right, where the threatened injury could be compensated by the recovery of damages; in these and in similar cases the court should hesitate to grant this remedy.

But the present is a very different case. The defendants Davis and others, commissioners are, under the statute, the *quasi* agents of the plaintiffs for the issuing of these bonds. They have no personal rights in the matter, but have only, as they claim, the authority to create a large debt which

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shall be in the name of the plaintiffs and binding on them. This debt, too, if once created, might be binding on the town even if the authority of the commissioners was obtained improperly, as the plaintiff claims that it was in fact. So that, if the bonds are once issued, the plaintiffs would seem to be remediless.

Nor can it be said that the railroad company, for whose benefit these bonds are to be issued, have any vested rights in the matter. The present, therefore, seems to be a proper case for an injunction *pendente lite*, if sufficient facts exist to maintain the plaintiffs' action.

I have examined the affidavits presented on both sides. It is not necessary to go over the details and discuss the alleged defects and insufficiencies in the consents. That will best be done on the trial. But without intending to pre-judge the case, as it may then appear, I think there is clearly enough to show that the bonds ought not to issue till the final decision. The question is whether the town, by a sufficient number of its tax-payers, has authorized the issue of these bonds. Unless this has been done the bonds ought not to issue.

It is said that the affidavit of the county clerk attached to the consents is, by statute, made evidence of the facts therein contained. If evidence, it is, at the most, not conclusive. And if the fact be, as alleged on the motion, that many of the signatures are forgeries, or, at least, are not in the handwriting of the persons whose they purport to be, certainly the county clerk's affidavit cannot, in such a suit as this, bar an investigation. I cannot think that in this suit, that affidavit can be conclusive on any of the objections presented by the plaintiffs.

Injunction granted.

Blakelee agt. Buchanan.

SUPREME COURT.

LEVI BLAKELEE agt. THOMAS BUCHANAN, JR.

Where the complaint and affidavit contain facts from which the judge who granted the order of arrest (for libel) became judicially satisfied that a cause of action existed, and that it was not one of a trivial character, and it cannot be said from the proofs presented upon the motion to vacate the order of arrest; that the discretion of the judge was erroneously exercised, the motion to vacate the arrest will be denied.

Oneida Special Term, October 18, 1872.

THIS action is brought for the purpose of recovering \$100,000 damages, alleged to have been sustained by reason of the publication and circulation, by the defendant, of an alleged libellous circular, set out in the complaint.

Upon the complaint and an affidavit of the plaintiff, Justice MORGAN granted an order of arrest holding the defendant to bail in the sum of \$10,000.

The bail was given, and the defendant, on the papers used to obtain the order of arrest and on his own affidavit, moves to discharge the order of arrest. The plaintiff reads additional affidavits in support of the arrest, and shows that the defendant, in 1871, conveyed his valuable real estate to his daughter, and has kept his business accounts in the name of members of his family; that he has left the state *en route* for Florida; and it was alleged by defendant's counsel that such absence from the state was on account of his health, and that fact was substantially conceded by the plaintiff's counsel on the argument of this motion.

The plaintiff was cashier of the Peoples' Safe Deposit and Savings Institution, lately doing business in the city of Utica.

Formerly the defendant was such cashier. The circular

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alleged in the complaint is sworn by the plaintiff to have produced "a run on the bank, and that the credit thereof was wholly destroyed;" that the publication was and is wholly false and malicious; and the plaintiff was thereby greatly injured in his character and credit, and his business was broken up and destroyed.

E. J. RICHARDSON *for the motion.*

J. THOMAS SPRIGGS, *of counsel.*

HARDIN, *J.*—Prior to the passage of the non-imprisonment act of 1831, the cases in which a defendant might be arrested were prescribed by the revised statutes. (2 *R. S.*, 348.)

In cases of libel it was necessary to apply for an order of a judge, who, in cases coming within the established practice, granted the order (*Graham's Pr.*, book 2, 105), and special circumstances were required to obtain the order (2 *Cains R.*, 47; 20 *Johns.*, 337).

The legislature, April 26, 1831, by what is known as the Stilwell act or non-imprisonment act, provided for certain cases of arrest.

That act was not repealed by the 179 section of the Code. Indeed it was expressly provided by section 178 of the Code that no person shall be arrested in a civil action except as prescribed by the Code, but the general words were followed by a proviso expressly continuing in force the Stilwell act; and the courts have, in numerous cases, determined that the act of 1831 remains in force. (*The People* agt. *Goodwin*, 50 *Barb.*, 562; *The People* agt. *O'Brien*, 6 *Abb.*, *N. S.*, 68; *Hall* agt. *Kellogg*, 12 *N. Y.*, 352; *Cobb* agt. *Harmon*, 23 *N. Y.*, 148.)

By section 179 of the Code, it is provided that a "defendant may be arrested as hereinafter prescribed in the following cases: in an action for the recovery of damages, on a cause of action not arising out of contract; * * when the action is for injury to person or character," * &c.

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The learned counsel for the defendant insists that an order of arrest, under the section quoted, should not be granted except such a case is made by the party applying as would have entitled him, according to the practice established under the Revised Statutes, to an order.

But it was held, in *Baker* agt. *Quackhamer* (5 How., 251), that the defendant is not entitled to have the order vacated upon the ground that no special cause for requiring bail is set up in the plaintiff's affidavit upon which the order was granted.

In commenting on the good sense of the former rule, MORSE, J. says: "It has been thought wise by the legislature to extend the power of plaintiffs to arrest and hold to bail in this class of actions." "That they have done so, I think, is too clear to be doubted." (5 How., 252.)

The defendant's counsel has cited *Davis* agt. *Scott*, (15 Abb., 127), opinion by DALY, J., in N. Y. C. P., in which it is said that, before the Code and since, the judge to whom an application is made for an order of arrest has a right to exercise a discretion; and, he adds, that it is a proper exercise to grant an order only in extreme cases; and he reaches, very properly, the conclusion, that such order should be refused in trivial actions calling only for nominal damages.

In harmony with the rule there laid down, is the case of *Crandall* agt. *Bryan* (15 How., 48), it is there said, the judge who grants the order should be satisfied on the force and weight of the affidavits produced, that a cause of action exists, and that the case is a proper one within the provisions of the Code. The evidence should be such that the judge may, upon the papers, be judicially satisfied. (4 Sandf., 715; 10 Abb., 411.)

In *Stuyvesant* agt. *Bowman*, (3 Abb., N. S., 270; S. C., 34 How., 51,) it was held that after an order of arrest has been granted it should not be vacated on a mere denial of the affidavits used to obtain it, for that would be trying the case on affidavits. That to induce a court to vacate, a case

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should be made so clear that if the same was before the court on trial it would justify a nonsuit.

Such a case has not been made on this motion.

The complaint sets out the circular, and the affidavit alleges that it is false and malicious.

The defendant denies that he published and circulated it.

The plaintiff alleges that he has sustained great damage by its publication and circulation, and alleges that his business has been broken up and ruined thereby.

The defendant's counsel insists that the plaintiff should allege more especially the nature and evil intent of the defendant in order to make out a cause of action against the defendant.

But the complaint sets out the circular or libel, and by inspection its words and language are as clearly before the court as though they had been repeated in the affidavit. The complaint is verified, and must be considered as an affidavit. (7 *Abb.*, 131 ; 7 *Bosw.*, 687 ; 28 *How.*, 211.)

The affidavit states that said libel "was and is wholly false and malicious, and deponent was thereby greatly injured in his character and credit, and his business was broken up and destroyed."

The complaint and affidavit contain facts from which the judge who granted the order became judicially satisfied that a cause of action existed, and that it was not one of a trivial character, and it cannot be said, from the proofs presented upon this motion that the discretion of the judge was erroneously exercised. 6 *Abb.*, N. S., 9, was cited by the defendant's counsel to establish that the circular alleged in the complaint in this action is not libelous.

That case has little application here, for that was an action brought by a corporation and the rule is somewhat different in actions of libel in behalf of corporations.

There must be special damages averred and proven in order to sustain the action (*Knickerbocker Life Ins. Co. agt.*

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Ecclesine, 11 *Abb.*, *N. S.*, 388, qualifying the rule of law in 18 *Abb.*, 413).

The articles set out in the case in 6 *Abb.*, *N. S.*, 9, were not libelous *per se*, and no allegations were found in the complaint of special damages.

In this case the circular set out in the complaint is libelous *per se*, and the complaint therefore, with the affidavit presented to the judge, made out a good cause of action against the defendant. (2 *Kent* 16; *Reade* agt. *Sweetser*, charge of *CLERKE, J.*, 6 *Abb.*, *N. S.*, 17.)

The defendant's learned counsel insists that it does not appear by the complaint that any of the defamatory matter in the circular relates to the plaintiff. The complaint will be found by inspection to conform to the rules of pleading in actions of libel.

By section 164 of the Code it is provided "that it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff." It has been held that it is not necessary to allege malice specially in the pleadings. (*Opp. of MASON J. Opdyke* agt. *Reed* (note), 18 *Abb.* 224.)

The motion to vacate the order of arrest is denied with \$10 costs.

Hawkins agt. Pemerton.

COURT OF APPEALS.

WILLIAM F. HAWKINS, respondent, agt. CLIFFORD PEMBERTON, *et al.*, appellants.

Where an auctioneer states, at the time of sale, "here are 25 barrels of blue vitriol, sound and in good order," it is a *warranty* to the purchaser that the article is sound and in good order, and that it is *blue vitriol*.

And it is error for the court below on the trial to withhold this evidence of warranty from the jury, when properly requested to submit it to them.

APPEAL by the defendants from a judgment rendered against them, at the general term of the superior court of the city of New York.

The following facts appeared upon the trial: On the 16th of January, 1867, Burdeth, Jones & Co., who were auctioneers in the city of New York, sold for the plaintiff, twenty-five barrels of what was called blue vitriol. The auctioneer, at the time of the sale, the plaintiff being present, stated that the article was "blue vitriol, sound and in good order." The defendants, being the highest bidders, became the purchasers at eight cents per pound, relying upon the representation of the auctioneer that it was "blue vitriol," and believing that it was such. At the time of the purchase the defendants examined some of it, and it had the appearance of blue vitriol, being blue. They took a sample of it away, and the next morning found that it had turned nearly all white at the surface from exposure to the air, and it was not blue vitriol, and they immediately notified the plaintiff that they would not take it. The plaintiff then notified them that he should sell it upon their account, and look to them for any loss. He accordingly did sell it at auction for about

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five cents per pound, and the loss was over \$400, which this action was brought to recover. It was subsequently discovered by chemical analysis that the article contained only from 17. to 25 per cent. of blue vitriol, chemically called sulphate of copper, and that the balance was mostly green vitriol, chemically called sulphate of iron or copperas. It was not possible at the time of the sale to discover by any examination which could then be made the true character of this article. It could be discovered by exposure for some hours to the air or by chemical analysis. This article had just been imported from Germany, and it was shown by a manufacturing chemist, who formerly resided in Germany, that it was known there as Salzburger vitriol, and not as blue vitriol. A chemist, sworn on behalf of the plaintiff, testified that it was not blue vitriol nor white vitriol, but chemically speaking, mixed vitriol. While sulphate of copper was worth from 8 to 9½ cents per pound, sulphate of iron was worth only 1½ cents per pound.

The defendants in this action set up warranty and fraud in the sale of the article; and at the close of the evidence upon the trial requested to go to the jury upon both grounds. The court refused the request, and directed a verdict for the plaintiff, and ordered the exceptions to be heard in the first instance at the general term. The cause was heard at the general term, and judgment ordered for plaintiff upon the verdict. From the judgment entered, the defendants appealed to this court.

IRA G. WARREN, *for appellants.*

I. The Court erred in not submitting the question to the jury, whether the defendants, when they represented this to be "twenty-five barrels of blue vitriol, sound and in good order," intended to warrant it to be so. The question, whether the words used were understood and intended by the parties as a warranty, is a question of fact for the jury,

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and should be left to them to determine. (*Duffee* agt. *Mason*, 8 *Cowen*, 25; *Whitney* agt. *Sutton*, 10 *Wend.*, 412; *Cook* agt. *Mosley*, 13 *Wend.*, 277; *Stryker* agt. *Bergan*, 15 *Wend.*, 490; *Rogers* agt. *Acherman*, 22 *Barb.*, 134; *Richardson* agt. *Mason*, 53 *Barb.*, 601; *Blackeman* agt. *Mackay*, 1 *Hilt.*, 226; *Bradford* agt. *Bush*, 10 *Ala.*, *N. S.*, 386; *Manill* agt. *Wallace*, 9 *N. H.*, 111.)

Where the seller said, at the time of the sale, "the cow is all right," it was held to be a question for the jury, whether these words were meant or intended as a warranty of her soundness, although, as in this case, the words were undisputed. (*Tottle* agt. *Brown*, 4 *Gray*, 457; *Foster* agt. *Caldwell*, 18 *Vt.*, 176.)

The representation was "here are 25 barrels of blue vitriol, sound and in good order."

It is a positive affirmation that the 25 barrels contained blue vitriol, that it was sound, and that it was in good order.

No particular form of words is essential to constitute a warranty. Any assertion of the vender is relied on by the vendee and understood by both parties as an absolute assertion, amounts to a warranty, and should be enforced as such. (*Chapman* agt. *Murch*, 19 *Johns.*, 290; *Sweet* agt. *Bradley*, 24 *Barb.*, 549; *Roberts* agt. *Morgan*, 2 *Cow.*, 438; *Wilbur* agt. *Cartwright*, 44 *Barb.*, 536; *Carly* agt. *Wilkins*, 6 *Barb.*, 557; *Holman* agt. *Dord*, 12 *Barb.*, 336; *Munson* agt. *Lombard*, 18 *Pick.*, 66; *Beeman* agt. *Buck*, 3 *Vt.*, 53.)

In a case in Massachusetts an auctioneer sold an article as "Manilla indigo," which in point of fact was not Manilla indigo, but a skillfully prepared compound so nearly resembling it that an expert could not detect the fraud by examination.

The court held that although the party examined it before purchase, yet the representation that it was "Manilla indigo" was a warranty. (*Henshaw* agt. *Robbins*, 9 *Metc.*, 83; *Story on Sales*, § 355, § 357, note 1.)

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If a vendor should, in selling a bar of German silver, affirm it to be silver, and the purchaser should thereby be deceived into the belief that it was Mexican silver, the sale would be void. (*Story on Sales*, § 167.)

This we say was a warranty that this article was "blue vitriol." The word blue vitriol has a strict and definite meaning. It means sulphate of copper. (*Worcester's Dictionary*, page 154; See also page 1635, "Vitriol." See plaintiffs' testimony, bottom of page 5, showing that he so understood it.)

It will hardly do to construe the auctioneer's statement as the court has at fol. 135, by stating that it was called "blue vitriol," as being its commercial designation or as being vitriol of a blue color.

"Blue vitriol" means "sulphate of copper" as much as the word "diamond" means pure carbon, and not paste. There is no evidence that that was its commercial designation. The only evidence upon that subject is that its commercial designation was Salzberger vitriol.

As to whether in point of fact it was or was not blue vitriol, there is a conflict of evidence. The defendants' evidence shows that it was a German article, wholly unknown in this country, but known in Germany as Salzberger vitriol.

Englehardt swears he would not call it blue vitriol. Pfizer swears it is not blue vitriol. Poley swears it is not blue vitriol. Toch swears it was not blue vitriol. Webster swears it was not blue vitriol. The chemical analysis shows it was not blue vitriol. On the other hand, the plaintiff swears it was blue vitriol.

He was permitted to put an invoice in evidence against our objection, in which the article is called sulphate of copper.

On this evidence the court at general term argue, and finally decide, that it was in fact blue vitriol.

We should have been better satisfied if the jury had been

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permitted to decide this conflicting question of fact, instead of the court, as we had five witnesses, against one, swearing that it was not blue vitriol.

The court in their opinion, state, "It was known as Salzberger vitriol in Germany, where it was manufactured, and as mixed vitriol in this country amongst chemists."

We claim that this was warranted to be blue vitriol, and that it was not, is a fact beyond dispute.

II. If this was blue vitriol, was it "sound and in good order," as it was represented?

Is an article sound when there exists a defect which the air will cause to develop itself so as to destroy the article in twelve hours?

Was it blue vitriol, sound and in good order, when it was mixed with an article which nothing but a chemical analysis could detect, that was certain to destroy it within twelve hours after it was exposed to the air? The court say, that "The liability of such compound to effloresce when exposed to the air was not a defect, because it was a natural quality of the sulphate of iron, which was one of its elements." It is not a natural quality of blue vitriol to effloresce, however, and sulphate of iron is not one of the elements of blue vitriol.

The plaintiff's representation was "blue vitriol," "sound and in good order." In point of fact, instead of its being "blue vitriol," three-quarters of it was an entirely different element, liable and certain to effloresce on exposure to the atmosphere. The court say that this foreign substance was not a defect, because to effloresce was one of its natural qualities. Because one of the natural qualities of the element of destruction mixed with the blue vitriol is to destroy, therefore the "blue vitriol" was sound and in good order. We cannot see the logic or justice of this reasoning.

The court say the word "sound" applies to condition only, and is opposed to defective, decaying or injured.

Was this vitriol defective; was it injured; was it in good

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condition, containing within itself a sure and certain element of its own destruction?

If a man sells me a steam boiler and warrants it "sound and in good order," and it turns out that there are some sheets of colored lead that could not be detected, so that finally it explodes, is it an answer to say that it was a steam boiler "sound and in good order," but of an inferior quality, because it is one of the natural qualities of lead to explode under a high pressure? Would not the word "sound" apply to the material of which the article was made? Is it "sound and in good order" if made of a defective and destructive material, so manipulated as to deceive the most practised eye?

"Blue vitriol, sound and in good order," will not effloresce.

The rules of the common law ought to be flexible enough to keep pace with the rapid march of chemical science and the untiring ingenuity of rogues.

When oride cannot be distinguished from gold; when paste is as brilliant and beautiful as the diamond; when an ordinary article of commerce, like this, can be so manipulated as to deceive the most skillful expert; when deception rules the hour, and half we see is fictitious and false, is it possible to apply the law to all this mass of falsehood and fiction and do justice, by clinging to, and feeling our way along by a balustrade of old cases, decided in different times and under other circumstances? Are we to be as firmly bound by their authority as the "pagan deities were supposed to be bound by the decrees of fate," no matter how men and times may have changed? The common law, properly administered, must meet the exigencies of this refined civilization. It must meet the ingenious, fraudulent rascal at the threshold of his iniquity, and not permit him when he buys paste (at the price of paste) to sell it for a diamond, without being liable to make his statement good.

There is a moral beauty in the civil law well worthy of adoption in this great state, which would afford ample and

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complete protection to the vendee, and teach vendors that if policy, and not honor, is to govern commercial transactions, honesty is the best. It would also obviate the necessity of learned judges questioning the morality of the law as laid down in the earlier cases. (*Op. PARKER, J.*, 9 N. H., 113.)

III. There was evidence to go to the jury that the plaintiff knew this was not blue vitriol, and that he knew just the character of the article he was selling. The court, therefore, erred in refusing to submit that question to the jury.

The court at general term say that there was no request to submit the question of fraud to the jury.

The court omitted to examine the case with its usual care, for this request is distinctly made.

The plaintiff swears that he imported this article; that it cost him three cents and a half a pound, while blue vitriol could not be bought less than from 8½ to 9 cents per pound, he having imported some by the same ship that brought this article; is not this conclusive evidence that he knew the character of the article?

This court says: "If the price is entirely below that of a second article, a presumption would arise that the purchaser was apprised of the defect." (*Hoe agt. Sayborn*, 21 N. Y., 566. *See opinion.*)

On page 10 of the case, when specimens were handed to the plaintiff, he seemed quite able to tell how much sulphate of iron there was in it. He purchased it in Cologne in Germany, where it was perfectly well known.

He had imported the same article before. This lot was a balance of two lots he had previously received. He imported a different article by the same vessel; he knew the difference perfectly well between this article and blue vitriol.

Although the price of blue vitriol had not gone down, the plaintiff re-sold it for blue vitriol to Toch four days after, and stood by and saw it sold at 4½ cents per pound, while blue vitriol was worth 9½ cents. Some of the casks were opened about half an hour before the sale.

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Was not this evidence upon which we had a right to go to the jury on the question of fraud?

Fraud can seldom ever be proved by direct evidence, but when so many independent circumstances lead directly to but one conclusion, that the plaintiff knew the character of the article he was selling, we think we were entitled to have that question submitted to the jury.

The fact that the plaintiff purchased it at three cents per pound, when he knew blue vitriol was $8\frac{1}{2}$ to 9 cents, was enough to put him on inquiry and make him liable for the consequences to the same extent as if he had actual knowledge. (*Craig agt. Ward*, 3 *Keyes*, 387.)

This was a fraudulent representation, whether the defendant knew it or not. (*Ross agt. Mather*, 47 *Barb.*, 582; *Bennet agt. Judson*, 21 *N. Y.*, 238.)

He undertook to assert something he knew was false. Something he did not know at the time to be true or false, which turned out to be false. (*Sneider agt. Heath*, 3 *Camp.*, 508, 509; *Marsh agt. Falkner*, 40 *N. Y.*, 571, *Op. Justice GROVER.*)

In this case the plaintiff must have had some knowledge of this article he sold as blue vitriol. He imported it himself from Germany. He paid but three cents per pound for it. He had some of the same lot before this. He kept the casks closed until a few minutes before the sale. On the trial he seemed able to tell it from other vitriol. He did not hesitate to re-sell it as blue vitriol after he was told it was not. He saw it sold for five cents per pound when blue vitriol was worth nine cents.

IV. The plaintiff knew perfectly well the character of this compound. He does not pretend that he was ignorant of the ingredients of which it was composed.

He persisted, on the trial, in calling it blue vitriol, and swearing that it was, notwithstanding a chemical analysis showed that more than eighty per cent. was another article.

He knew perfectly well that blue vitriol was sulphate

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of copper. When, therefore, he sold this and called it blue vitriol, did he not intend to induce the purchaser to believe that it was sulphate of copper? (*Johnson agt. Hathorn*, 2 *Keyes*, 476.)

It was a question for the jury at all events, as there was abundance of evidence to raise the presumption of fraud. (*Johnson agt. Monell*, 2 *Keyes*, 655.)

V. The court, under our objection, admitted in evidence a bill of lading received by the plaintiff from the consignors of this article.

We objected to the reading any statement contained in the bill of lading as to what the article was, which objection was overruled.

The court admitted this evidence, and the general term seem to treat this as evidence of the character of the article.

It was only competent (if at all) to rebut the presumption of fraud, yet the court used it as evidence of what the article was, and took the only question upon which it was competent (if at all) from the jury.

We submit it was not competent for any purpose, and should have been rejected.

VI. The case of *Seixas agt. Woods* referred to was decided on the authority of *Chandler agt. Lopus*. All that *Chandler agt. Lopus* decided was, that because the declaration alleged no warranty it was not good. (2 *Smith's Leading Cases*, 5 *Am. ed.*, 238.)

"If the plaintiff in *Chandler agt. Lopus* had declared on a warranty of the stone, he would at the present day have probably succeeded." (2 *Smith's Leading Cases*, 5 *Am. ed.*, 238, *note*.)

"If not, he would at all events succeed if he were to sue in tort, laying a *scienter*, since the fact of the defendant's being a jeweler would be almost irresistible evidence that he knew his representations to be false." (2 *Smith's Leading Cases*, 239 and cases cited.)

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In *Seixas* agt. *Wood* there appears to have been no representation made at the time of the sale.

If there had been anything said then it would have been a question whether it was intended as a warranty.

That was a question for the jury and not for the court.

Chancellor KENT says of the case of *Seixas* agt. *Wood*: "There is no doubt of the general rule of law as laid down in that case, the only doubt is, whether it was well applied in that case where there was a description in writing of the article by the vendor, which proved not to be correct, and from which a warranty might have been inferred." (2 *Kent*, 9th ed., 644; See *Henshaw* agt. *Robbins*, 9 *Metcalf*, 86.)

The same criticism applies to the case of *Sweet* agt. *Colgate*.

Neither of these cases, nor any of this class of cases, are applicable to a case like this, where, at the time of the sale, there is a positive affirmation. "Here are twenty-five casks of blue vitriol, sound and in good order?"

Is it the province of a judge, at trial term, to say this is not intended as a warranty that this is blue vitriol; that it is sound blue vitriol; that it is blue vitriol in good order.

The whole language shows that it was intended as a warranty; but if there was any doubt about it, it should have been left to the jury to say what the parties intended and understood.

VII. We ask that this judgment be reversed and a new trial ordered.

R. S. EMMET, *for respondent*.

First.—The facts of this case upon the evidence are undisputed—there is no conflict of testimony. The sale at auction of the blue vitriol was made in the ordinary way, both vendor and purchaser acting in good faith.

I. The representation of the auctioneer that the article was sound and in good order, if it amounted to a warranty,

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was only a warranty of its condition, not of its quality or grade. The condition of the goods is not impeached—it is not pretended but that they were in good salable condition.

II. The vendor had no superior knowledge of the condition, quality or grade of the goods than the purchaser. The vendor had every reason to believe that they were of fair merchantable quality.

1. They were so represented to him in the bill of lading and the invoice.

2. They were purchased by him at a fair merchantable price.

3. Similar goods consigned to him by the same invoice had been previously sold by him in the same way, and accepted by the purchasers without complaint.

III. The condition, quality, and grade of the article were patent; it was fully exposed for examination before the sale, and appears to have been fully examined by the purchasers and other bidders.

IV. The purchasers knew that they were buying blue vitriol of an inferior grade and quality.

1. Both defendants so testify.

2. They paid an inferior price—8 cents per pound; the market value of pure blue vitriol was 9½ cents per pound.

3. They were drug brokers, engaged in the business for many years, and both testify as to their knowledge of this particular article.

V. The article was merchantable as blue vitriol—the previous and subsequent sales proved it to be so. It was so in color and general appearance, and of its compounds, sulphate of copper was the greatest value.

Second.—When the party, after seeing and examining goods, purchases them at auction or private sale without warranty, and without fraud or misrepresentation on the part of the seller, he takes them wholly at his own risk, and cannot either rescind the purchase or recover damages because the goods proved to be of an inferior quality, or

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even of a wholly different character from what they were mutually supposed to be at the time of the purchase. (*Seixas* agt. *Woods*, 2 *Caines*, 48; *Swett* agt. *Colgate*, 20 *Johns.*, 196; *Welsh* agt. *Carter*, 1 *Wend.*, 185; *Carley* agt. *Wilkins*, 6 *Barb.*, 558; *Holden* agt. *Dakin*, 4 *Johns.*, 421.)

I. The reason of this doctrine of *caveat emptor* applies more forcibly to auction than private sales, because the publicity of the sale is a guaranty against fraud in the vendor.

II. The vendor's knowledge that the article is of an inferior quality, and his withholding that fact, are no grounds for the purchaser breaking the bargain. (*Swett* agt. *Colgate*, *ubi sup.*)

III. Naming an article by which to sell it, is not a warranty. It is a mere description of the article. (*Seixas* agt. *Woods*, *ubi sup.*; *Swett* agt. *Colgate*, *ubi sup.*; *Welsh* agt. *Carter*, *ubi sup.*)

IV. Even if the article be made expressly for the purpose of deception, it would not change the rights of a seller ignorant of the deception. (*Welsh* agt. *Carter*, 1 *Wend.*, 185.)

V. The adulteration of a chemical or commercial article does not change its name—as; for example, adulterated liquors, or coffee or sugar. Nor does such adulteration affect the condition of the article; it may affect its quality. The article may be of inferior quality, but in excellent condition. (*Holden* agt. *Dakin*, 4 *Johns.*, 421.)

VI. The burden of proving fraud is upon the vendee. (*Welsh* agt. *Carter*, 1 *Wend.*, 185.)

VII. The price paid implies no warranty. (*Holden* agt. *Dakin*, 4 *Johns.*, 421.)

Third.—The bill of lading and invoice were properly admitted in evidence; they were not offered or admitted as a representation of the quality or condition of the article, but as evidence of the vendor's *bona fides*, and as such were competent. (*Swett* agt. *Colgate*, 20 *Johns.*, 196.)

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Fourth.—The court properly directed a verdict for the plaintiff. There was no question of fact for the jury. Although the answer charges fraud, this defense was abandoned; on the trial, not a particle of testimony as to fraud, was offered. The only question in the case was whether, on the undisputed facts, the plaintiff was entitled in law to a recovery. Such appears to have been the opinion of the defendants' counsel on his motion to dismiss the complaint, and such was the view properly taken of the case by the court. (*Seixas* agt. *Woods*, 2 *Caines*, 48; *Swett* agt. *Colgate*, 20 *Johns.*, 195; *Hargous* agt. *Stone*, 5 *N. Y.* 78.)

Fifth.—The plaintiff is entitled to judgment on the verdict.

EARL, Com.—This action was brought against the defendants, as purchasers of an article called, at the time of the sale, blue vitriol, to recover damages for refusing to take and pay for the same; and, upon the trial, the court refused to submit the evidence to the jury, and ordered a verdict for the plaintiff.

The defendants failed to establish their defense of fraud, and upon that question I think there was no evidence to submit to the jury. We have only, therefore, to consider whether there was evidence tending to show that the plaintiff, at the sale, warranted the article to be blue vitriol, sound and in good order, and that there was a breach of this warranty.

It is unquestioned that there was a warranty that the article was sound and in good order, and I am quite clear that there was no breach of this warranty. It was good, sound Salzberger, or mixed vitriol. It was just as it was made, not damaged or in any way out of order. It was in its natural, normal condition, and it could not be said of such an article that it was unsound.

Did the plaintiff warrant the article to be blue vitriol? It is unquestioned that at the time of the sale, through his auction-

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eer, he represented it to be blue vitriol, and that the defendants bought it as such, relying upon that representation.

To constitute a warranty, it is not necessary that the word warranty should be used. It is a general rule that whatever a seller represents at the time of a sale is a warranty. (*Wood agt. Smith*, 4 *Car. & P.*, 45.) In *Stone agt. Denny*, (4 *Metcalf*, 151), it is said that the courts, in their later decisions, "manifested a strong disposition to construe liberally in favor of the vendee, the language used by the vendor, in making any affirmation as to his goods, and have been disposed to treat such affirmation as warranties whenever the language would reasonably authorize the inference that the vendee so understood it." In *Oneida Manufacturing Society agt. Lawrence*, (4 *Cowen*, 440). Chief Justice SAVAGE says: "There is no particular phraseology necessary to constitute a warranty. The assertion or affirmation of the vendor concerning the article sold must be positive and unequivocal. It must be a representation which the vendee relies on, and which is understood by the parties as an absolute assertion, and not the expression of an opinion." And generally, when the representation is not in writing, the question of warranty is to be submitted to the jury. (*Duffee agt. Mason*, 8 *Cowen*, 25.)

It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so, if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it, and is induced to buy by it, the vendor is bound by the warranty, no matter whether he intends it to be a warranty or not. He is responsible for the language he used, and cannot escape

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liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee.

Here it is not questioned that the language used was sufficient to constitute a warranty that the article sold was sound and in good order, and why should it not as well extend to the character of the article? When a buyer purchases an article, whose true character he cannot discover by any examination which it is practicable for him to make at the time, why may he not rely upon the positive representation of the seller as to its character as well as to its quality and condition? I can discern no distinction in principle in the two kinds of representations, and yet it is claimed on behalf of the plaintiff that there is a distinction, and certain cases are cited to uphold it, which I will proceed briefly to consider.

The first is the celebrated case of *Chandler agt. Lopus*, (*Cro. Jac.* 4.) That was an action upon the case, and the plaintiff alleged in his declaration that the defendant sold him a stone, which he affirmed to be a bezar-stone, whereas it was not a bezar-stone. The defendant plead not guilty, and the plaintiff had a verdict. The case was taken by writ of error to the exchequer chamber, and it was there held that the declaration was not good, "for the bare affirmation that it was a bezar-stone, without warranting it to be so is no cause of action." The court say, "Every one in selling his wares will affirm that his wares are good, or the wares which he sells are sound; yet, if he does not warrant them to be so, it is no cause of action." This was the reason assigned for the decision. It was not denied that the defendant would have been liable if he had warranted the stone, but a mere affirmation was held not to be a warranty. No distinction was made between an affirmation as to the character of an article and an affirmation as to its condition or quality. The doctrine laid down is, that a mere affirmation or representation as to the character or quality of goods sold will not constitute a warranty; and that doctrine has long since

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been exploded, and the case itself is no longer regarded as good law in this country or England. (*Hilliard on Sales*, 237, note; 2 *Kent's Com.*, Comstk's ed., 633, note a; 2 *Smith's Leading Cases*, 5 Am. ed., 238; *Bradford agt. Manly*, 13 Mass., 139; *Howe agt. Denny*, 4 Metcalf, 151.)

The case of *Seixas agt. Wood*, (2 *Caines*, 48), seems to have been decided mainly upon the authority of the case of *Chandler agt. Lopus*. That was an action on the case for selling peacham wood for brazilletto, the former worth hardly anything, the latter of considerable value. The defendant advertised the wood as brazilletto; showed plaintiff the invoice in which it was so described, and billed it to the plaintiff as such. The plaintiff had a verdict subject to the opinion of the court, and the court held that there was no expressed warranty, and that the defendant was not therefor liable. There was no intimation in the opinion delivered that there was any difference between a warranty as to the character of an article sold and warranty as to its condition and quality. The court simply held that the representation on the part of the defendant did not amount to an express warranty. They were laying down broadly the common law doctrine of *caveat emptor* and combating the implied warranties of the civil law. Hence great stress was laid upon the requirement of an *express* warranty. The rule, as thus laid down has been thoroughly overturned since the courts hold that any positive affirmation or representation as to the character or quality of an article sold, may constitute a warranty. The case has been much questioned, and can no longer be regarded as authority for the precise point decided. (2 *Kent's Com.*, Comstk's ed., 633; *Howe agt. Denny*, 4 Metcalf, 151; *Henshaw agt. Robins*, 9 Metcf., 83, 89; *Brainard agt. Spring*, 42 Barb., 470; *Hart agt. Wright*, 17 Wend., 267, 271; *Barrkins agt. Becan*, 3 Serg. & R., 37.) The case holds that a vendor is liable upon an express warranty of the character of the article sold, and the more recent cases hold that a positive affirmation understood

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and relied upon as such by the vendee, is an express warranty.

The case of *Swett* agt. *Colgate*, (20 *Johns.*, 196), is quite analogous to the case of *Seixas* agt. *Woods*, and was decided mainly upon the authority of that case. The defendants purchased at auction, goods invoiced, advertised and sold as barillo, when, in fact, it was kelp, a much inferior article. It came before the supreme court upon a case containing the facts, and the court exercising the province of a jury, drew the inference from all the facts of the case that there was no warranty; laying down, however, the rule, that if there had been a warranty the vendors would have been liable. No intimation is contained in the case that there is any difference between an affirmation by the vendor as to the character of the article sold and one as to its quality or condition. Upon the same state of facts, as the law is now settled, it would be a question of fact for the jury whether or not there was a warranty.

The cases of *Seixas* agt. *Wood*, and of *Swett* agt. *Colgate*, have been frequently cited in our courts, and have, doubtless, influenced, and, it may be, controlled the decisions in other cases. The propositions of law announced in them are sufficiently correct; but in view of the rules of law as now settled in this and other states, I am of opinion that the law was not properly applied to the facts appearing in those cases.

Here, then, was a positive representation, that the article sold was blue vitriol, the plaintiff meant the purchaser to understand that it was blue vitriol, and he sold it as such. The defendants relied upon the representation, believing it to be blue vitriol, and bought it as such. If, upon these facts, the court was not authorized to hold as matter of law that there was a warranty, it was at least bound to submit the question of warranty to the jury. In *Allen* agt. *Lake*, (18 *Adol. & Ellis*, N. S., 561), the defendant sold plaintiff a parcel of turnip-seed and gave them a sold note. in which it

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was described as "Skirving's Swedes." It proved not to be such, but of an inferior and spurious kind. The court of Queen's bench held that the statement in the sold note was not mere representation or matter of description, but that it amounted to a warranty that the seed was Skirving's Swedes. In *Bridge agt. Wain*, (1 Starkie, N. P., 410), the defendant sold to the plaintiff a quantity of scarlet cuttings intended for the Chinese market, and which were understood among merchants to mean cuttings of cloth only without mixtures of serge or other material; and it was proved that the article sold contained a quantity of serge, and that a part consisted of much smaller shreds than that usually sent to China, and that it would be very unprofitable, if not wholly unsaleable. There was no special warranty, but it appeared that in the bill of parcels the goods were described as scarlet cuttings; and Lord ELLENBOROUGH ruled if they were sold by the name of scarlet cuttings and were so described in the invoice, an understanding that they were such would be inferred. In *Power agt. Barhan*, (4 Adol. & Ellis, 473), the action was for breach of warranty on the sale of pictures. It was proved, among other things, that the defendant, at the time of the sale, gave the following bill of parcels: "Four pictures, views in Venice. Canaletto, £160." The judge left it to the jury, upon this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description or intimation of opinion. The jury found for the plaintiff, saying that the bill of parcels amounted to a warranty. The King's bench held that the question of warranty was rightly left to the jury, and that the verdict should not be disturbed. Lord DENMAN says: "It was for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness or conveyed only a description or an expression of opinion." In *Barrekins agt. Bevan*, (3 Serg & Rawls., 37), ROGERS, J. says:

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"From a critical examination of all the cases it may be safely ruled that a sample or description in a sold note, advertisement, bill of parcels or invoice, is equivalent to an express warranty that the goods are what they are described or represented to be by the vendor." In *Bradford* agt. *Manly*, (13 *Mass.*, 144), Chief Justice PARKER refers to a case which came before him at *nissi prius*, of which he says: "An advertisement appeared in the papers, which was published by a very respectable mercantile house, offering for sale good Caraccas cocoa. The plaintiff made a purchase of a considerable quantity and shipped it to Spain, having examined it at the store before he purchased; but he did not know the difference between Caraccas and other cocoa. In the market to which he shipped it there was a considerable difference in favor of Caraccas. It was proved that the cocoa was of the growth of some other place, and that it was not worth so much in that market. I hold that the advertisement was equal to an express warranty, and the jury gave damages accordingly. The defendants had eminent counsel, and they thought of saving the question, but afterwards abandoned it, and suffered judgment to go." In *Henshaw* agt. *Robins*, (9 *Metcalf*, 83), it was held in a case quite analogous to the one now under consideration, that when a bill of parcels is given upon a sale of goods describing the goods, or designating them by a name well understood, such bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be, and that this rule applies, though the goods are examined by the purchaser at or before the sale, if they are so prepared and present such an appearance as to deceive a skillful dealer.

It can make no difference that in most of the cases cited the description of the article sold was contained in a sold note or bill of sale. The same affirmation made orally must, upon principle, have the same force and effect.

I, therefore, reach the conclusion, both upon principle and authority, that upon the facts of this case a jury might

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properly have inferred that there was upon the sale a warranty, that the article sold was blue vitrol. It was, at least, the duty of the court to have submitted the question of warranty to the jury. I think the facts were so clear and undisputed that the court could, without error, have decided as a question of law that there was a warranty, but this it is unnecessary to decide upon this appeal:

The only remaining question to be considered is whether there was a breach of this warranty, and this can need but little discussion. The article sold, if it was known at all in market, was known by another name. It had only from 17 to 25 per cent. of blue vitrol in it. It was not an inferior article of blue vitrol, but a different substance with a small admixture of blue vitrol.

The judgment should therefor be reversed and a new trial granted, costs to abide event.

EARL, C. reads for reversal; all concur; judgment reversed; new trial granted; costs to abide event.

Jaeger agt. Kelly.

SUPREME COURT.

ANTON JAEGER, respondent, agt. JOHN KELLY, sheriff, &c.,
appellant.

This action was brought to recover the value of 1364 gallons of wine, belonging to the plaintiff, which was levied upon and sold by the defendant under an execution against S. and L.

The defendant's counsel demanded to go to the jury, 1st, upon the question whether the sale of the 15 casks of wine by L. to the plaintiff was in fraud of S., a creditor of L. 2nd, As to what were the contents of the casks. 3rd, Also requested the court, to instruct the jury that there was no evidence upon which they could find that the casks contained 1364 gallons of wine. 4th, That interest by way of damages on the value of the wine could not be included in their verdict for the plaintiff—The court refused these requests and directed the jury to find for the plaintiff, leaving it to them to assess the damages.

Held, that there was no contradictory evidence on the question of title, and no evidence to prove any fraud in the sale.

Held, also that the inadequacy of price was not a sufficient ground to hold the sale fraudulent, or to sustain a verdict for the defendant.

Held, also, that there was some evidence but slight, that L. disposed of the wine to prevent its being reached by S. as a creditor, but there was none affecting the plaintiff with a guilty knowledge or that his purpose was not honest and fair.

Held, also that there was evidence *prima facie* that the casks contained wine. There was evidence that the casks were gauged by government officials, as containing the quantity stated. As against an alleged trespasser the proof was quite sufficient—It was for him to give evidence to raise a doubt, before the jury could be called upon to decide it.

There is no doubt that interest may be added to the value at the time of the conversion as damages.

New York, General Term, Sept., 1872.

THIS action was brought to recover the value of 1,364 gallons of wine, belonging to the plaintiff, which was levied on and sold by the defendant under an execution against Ferdinand Stoessel and Theodore Lingenfelder.

The defendant, in his answer, denies the ownership of the plaintiff—the value and quantity of the wine—and the conversion; and, at folio 10, has the extraordinary denial,

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when looked at in the light of truth, that he never at any time or place sold said wine.

He then avers, at folio 14 of his answer, that he levied on this wine by virtue of an execution against Stoessel and Lingenfelder, and that Stoessel and Lingenfelder, jointly, or one of them, individually, had an interest in said wine.

The only issue therefore was who did the wine belong to at the time the levy was made. The jury found a verdict for the plaintiff for \$3,874.60, which was the value of the wine as the plaintiff proved it.

Judgment was entered on the verdict, and from that judgment the defendant appeals to this court.

A. J. VANDERPOEL, *for appellant.*

First.—The court erred in refusing to allow the case to go to the jury on the question whether or not the sale, if made at all, was made in fraud of Stoessel, at that time a creditor of Lingenfelder on the note on which the judgment in evidence was recovered.

1. By the provisions of our statutes every conveyance made with intent to hinder, delay or defraud creditors or other persons of their lawful suits or demands shall be void as against the persons so hindered, delayed or defrauded. And the question of fraudulent intent shall be deemed a question of fact and not of law. (2 R. S., *Edmunds' ed.*, 142, §§ 1–4; *Murray agt. Burtis*, 15 Wend., 212; *Peck agt. Crouse*, 46 Barb., 151; *Vance agt. Phillips*, 6 Hill, 433; *see* 12 Barb., 533.)

2. There was evidence from which the jury would have been justified in finding the transfer fraudulent. The sale was for less than half the value of the property. Stoessel's judgment was about to be entered. The transfer was not in the usual and ordinary course of business, and the payment of the Straub note by the plaintiff as a part of the consideration was extraordinary. There was no witness as to

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the transfer or payment except the plaintiff himself, and he was impeached by his own evidence. He swears, "I saw the wine gauged; it was done by the U.S. gauger."

On his cross-examination he says, "The barrels had the gauger's marks on them, both those of Europe and the U.S. gauger. That is all I know about the quantity."

At folio 21, he says, "I paid Lingenfelder the custom-house fees, \$568.37." And at folio 32, he says, he paid this to the custom-house and not to Lingenfelder. At fols. 21-22 he swears he paid the custom-house duties, June 8th; that the wine was delivered to him the 8th; and that "on the same day, June 8th, a hired carman took it away." At fol. 31 he says, "I did not take the wine June 8th," but "I made a bargain that day"; and at fol. 35 he says he did not buy the gold to pay the duties until June 11; and the general effect of his cross-examination is to discredit him.

3. The evidence of Stoessel shows that the motive of the transfer was to defeat the payment of his notes.

4. The connection of the person called Eistel with the matters, as detailed by the plaintiff himself, shows that the plaintiff was not acting *bona fide*, but only as a cover for Lingenfelder, whom Eistel represented.

Eistel introduced plaintiff to Lingenfelder; the bargain for the wine was made by plaintiff with Eistel; Eistel also acted for the plaintiff; Eistel told plaintiff about the Straub note.

Eistel made a bargain for the cellar, 140 Water street, to which the wine was taken when removed from the custom-house. The wine was to be stored at the cellar without expense to plaintiff, because Mr. Isaacs, the owner of the cellar, was a friend of Eistel's.

From the defendant's evidence it appears that Eistel and Isaacs are the same person, and that the cellar at 140 Water street was Eistel's.

Second.—The court erred in refusing to submit to the jury the question whether any sale to the plaintiff took place, as

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testified to by the plaintiff, and also as to what the actual contents of the casks were.

1. As already shown, the alleged sale to plaintiff was not *bona fide*, but was only a colorable transfer, engineered by Eistel to keep the property from being taken by the holders of the notes, which Lingenfelder had given to Stoessel.

The small price of 92½c. per gallon, and all the attending circumstances of the alleged sale, tend to establish this.

2. The contents of the casks was a question of fact, which the jury should have passed upon.

Third.—The charge to the jury was erroneous in the following respects :

1. The judge was mistaken in saying "there was no question made in the pleading about the quantity of wine."

The complaint avers there were fifteen casks, containing 1,364 gallons. The answer avers "that said casks did not contain 1,364 gallons."

2. The court charged that the sheriff sold it by the guage marks. There was no evidence that he did.

3. The instruction to the jury to add, to what they should find to be the value, interest thereon at 7 per cent. from the time of taking by the sheriff, and for that amount the plaintiff was entitled to their verdict, was erroneous.

Fourth.—The verdict is not sustained by the evidence.

The greatest quantity of wine claimed by plaintiff, or testified to, was 1,364 gallons. The highest price testified to was \$2 per gallon on the average. That would make the value \$2,728. Interest on this amount from June 12, 1867 (the date of seizure), to March 13, 1871 (the date of trial), being 3 years, 9 months, and 1 day, at 7 per cent., is \$716.59. Add this to the value, as instructed by the judge, and we have a total of \$3,444.59 as the greatest amount for which verdict could be rendered upon the evidence. The verdict was \$3,874.60.

Fifth.—The judgment should be reversed and a new trial ordered.

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C. W. VAN VOORHIES, *attorney and*
IRA D. WARREN, *counsel for respondent.*

First.—The plaintiff swears that he was introduced to Lingenfelder by a broker named Eistel. That he bought some wine of Lingenfelder. That the bill of the wine, at pages 9 and 10, is correct. That he saw it gauged. That he stood by when it was gauged, and that there were 1,364 gallons.

He bought it on the 8th of June, 1867; paid a note of \$250 for Lingenfelder on that day, which Lingenfelder owed to Swaub, as a part payment for the wine.

That afterwards, on the 11th of June, he paid the duties at the custom house and the bonded warehouse, and the wine was delivered to him, at which time he paid Lingenfelder the balance due on the wine. He took a cellar in Water Street and stored the wine.

That the sheriff came a day or two afterwards and took it away, and that it was worth from \$2 to \$2.25 per gallon.

There is not one word of conflict, nor the slightest contradiction on any of this, except on the question of value.

The wine was sold and delivered to the plaintiff, paid for by him, and put in his own store before the levy. There is no fraud set up in the answer, and no question except ownership made.

The court was therefore right in instructing the jury that the plaintiff was entitled to recover. Also in refusing to submit the question to the jury, as in the defendant's second request, whether or not a sale took place. Also in refusing the defendant's third request, as to whether it was a fraudulent sale. There is no fraud alleged in the answer, and none is proved.

Second.—The court was also right in refusing to submit to the jury the defendant's fourth request, "as to what the actual contents of the casks were." Every one engaged in

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the trial at this stage of the case, except the learned counsel for the defendant, knew that it was undisputed, that the actual contents of the casks was wine.

Third.—The court was also right in refusing to instruct the jury, as per the fifth request, “that there was no evidence upon which they could find that the casks contained, at the time of the levy or sale, 1,364 gallons, or any such number of gallons.”

At folio 19 the plaintiff swears that there were 1,364 gallons, that he stood by and saw it gauged. This is some evidence of the fact—enough, at all events, to make such an instruction improper.

Fourth.—The court was right in refusing to charge the seventh request, viz., “that the jury cannot include, by way of damages to the plaintiff in this action, interest on whatever they might find the value of the wine to be.”

Interest on the value of the property at the time of the conversion is always allowed. (*Andrews agt. Durant*, 18 N. Y., 502; *Sedgwick on Damages*, 477, note 1 and cases.)

Fifth.—The defendants excepted to the charge “where the court says no question is made in the pleadings or elsewhere as to the quantity of wine.” The court does not say “or elsewhere” at all. The court might well have said so, however, as it is sworn to by the plaintiff, and no one disputes it. There was therefore no question for the jury about the amount, and the court was right in so charging.

Had the defendants desired to question the quantity, they had it, and could easily have done so if the plaintiff was not correct.

The court did not tell the jury “that they must assume that it was bought and sold by gauge marks.” The instruction there given was for the benefit of the defendant, for the evidence is that the plaintiff saw it gauged.

It is true he took the marks afterwards, and for aught that appears, the Sheriff did also. As the quantity is clearly

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proved and rests on uncontroverted evidence, and that part of the charge relates to a branch of the case not submitted to the jury, it could have no bearing on the case.

The next exception to the charge, as to interest on the value, has been already noticed.

Sixth.—The learned counsel, challenged each of the jurors for principal cause, and moved the court that they be sworn to try the issues between the parties.

The court stated that the jurors were sworn, at the commencement of the term, to try all the issues presented to them. To which the defendant's counsel excepted. No ground of challenge is stated, hence it amounts to nothing and should be disregarded. (*Freeman* agt. *The People*, 4 *Denio*, 9.)

A general oath may be administered to jurors at the opening of the court.

It is not necessary that they should be sworn in each case in which they are called. (*People, &c.* agt. *Albany C. P.*, 6 *Wend*, 548.)

Seventh.—We ask that the judgment be affirmed, with costs.

By the court, LEONARD, J.—The defendant's counsel demanded to go to the jury upon the question whether the sale of the fifteen casks of wine by Lingenfelder to the plaintiff was in fraud of Stoessel, a creditor of Lingenfelder, and as to what were the contents of the casks; and also requested the court to instruct the jury that there was no evidence upon which they could find that the casks contained 1,364 gallons of wine; also that interest by way of damages on the value of the wine could not be included in their verdict for the plaintiff. The court refused these requests, and directed the jury to find for the plaintiff, leaving it to them to assess the damages. There was no contradictory evidence on the question of title, and no evidence to prove any fraud in the sale. The plaintiff proved the purchase of the wine by his

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own evidence. He paid 92½ cents per gallon, of which over \$500 was in gold, in June, 1867, when, as it is well remembered, gold bore a large premium. The value, as stated by him, was \$2 per gallon on an average, some of it being worth \$2.25.

The inadequacy of price was not a sufficient ground to hold the sale fraudulent or to sustain a verdict for the defendant. The memory of the plaintiff, when cross-examined, appeared to be defective on some unimportant points, but there was nothing in his evidence to cast any doubt upon the fairness or validity of the sale. It may be conceded that there was some evidence, but slight, that Lingenfelder disposed of the wine to prevent its being reached by Stoessel as a creditor, but there was none affecting the plaintiff with a guilty knowledge, or that his purpose was not honest and fair.

There was no room to doubt that the contents of the casks were wine; the plaintiff had tasted some of it; he had purchased it as wine, and he paid for 1,364 gallons of it as such. There was evidence that the casks were gauged by government officials as containing that quantity of wine, and that the duty was paid as upon wine.

This evidence was sufficient *prima facie* to prove the contents of the casks to be wine, and that they contained the quantity claimed. There was no evidence whatever casting a suspicion upon the reliability of this testimony. As against an alleged trespasser, the proof was quite sufficient. It was for him to give evidence to raise a doubt before the jury could be called upon to decide it.

There is no doubt that interest may be added to the value at the time of the conversion as damages. (*Andrews agt. Durant*, 18 N. Y. R., 502.) On the question of value it was proved by the plaintiff that the wine averaged two dollars per gallon. Against that was the fact that he paid less, and that it was sold by the sheriff at auction for a price still below that paid by the plaintiff. The jury had the subject before them, and there is no doubt that they intended to adopt the

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higher price named by the plaintiff as the value, with interest from the time of the conversion. The wine, at \$2, amounts to \$2,728 and interest from the time of the conversion to the trial, is \$716.60, being three years and nine months. The verdict was \$3,874.60, being an excess of \$430 over the proper sum.

This sum should be deducted from the verdict.

The judgment must be reversed, and a new trial awarded with costs to abide the event, unless the plaintiff stipulate to deduct \$430 from the verdict, and upon such stipulation being filed and acknowledged, the judgment may be amended by making such deduction as of the day it was rendered and so amended, may be affirmed, but without costs of the appeal.

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COURT OF APPEALS.

WILLIAM W. STONE and others, respondents, agt. WILLIAM C. BROWNING and others, appellants.

Where the principal, and, in fact, the only questions submitted to the jury, were whether the cloth sold by the plaintiffs to the defendants was sold by sample with a warranty, and whether it corresponded with the sample, the decision of the jury thereon cannot be disturbed.

A contract of sale of goods is void by the statute of frauds where there is no part payment of the purchase money, nor note, or memorandum of the contract, nor unless the purchasers both accept and receive the goods purchased, or some part thereof.

It is not sufficient to bar the statute that the goods were *delivered* to the purchasers; they must also have *accepted* them. A delivery of property to satisfy the requirements of the statute of frauds, must be a delivery by the vendor with the intent of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking possession as owner.

In this case the evidence showed that the defendants, the purchasers of the cloth from the plaintiffs, had not sufficient opportunity to examine the cloth while it was in the store of the plaintiffs, and hence it was arranged that it should be taken to the store of the defendants, and they were to examine it within one week, and if they were satisfied as to the quantity and quality of the cloth, then they were to give their note for the purchase price. They did take the cloth, and examine it, and after the examination, refused to accept it.

Held, that the defendants did not take possession of the goods as owners, and it was not the intention of the parties that the title in them should vest in the defendants before they examined them and gave their notes. (*Reversing S. C.*, 49 Barb., 244.)

October, 1872.

THIS is an appeal by the defendants from a judgment of the general term of the supreme court in the first judicial district, affirming a judgment on a verdict at the circuit, in favor of the plaintiffs.

The action was brought to recover the balance of the purchase-money of a quantity of goods, claimed by the plaintiffs to have been sold and delivered by them to the defendants under a verbal contract of sale.

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The defendants denied the allegation in the complaint in reference to the sale and delivery. They also set up, among other defenses, separate defenses, that goods were sold by sample, with an express warranty that the goods exhibited were fair and correct samples of the whole, and also that the sale was within the statute of frauds and void.

A motion was made to dismiss the complaint on those, among other grounds, when the plaintiffs rested their case, and again, at the close of the evidence the motions were denied.

The defendants' counsel then requested the court to charge the jury upon several distinct propositions, one of which was in the following terms: "Ninth, if you find the defendants never intended to, and did not, in fact, accept the goods delivered, then your verdict should be for the defendants," which request was refused. Exceptions were taken to the denial of the motions to dismiss the complaint and to the refusal to charge in accordance with the above request.

The judge charged the jury on the rule of law applicable to sales by warranty and sale, to which no exception was taken by either party.

The jury found a verdict in favor of the plaintiffs, and a judgment entered thereon was affirmed on appeal by the general term, and the defendants have appealed from the judgment of affirmance.

A. PRENTICE & JOHN K. PORTER, *for appellants.*

WILLIAM TRACY, *for respondents.*

EARL, *Com.*—Upon the trial the principal questions litigated were whether the cloth was sold by sample with a warranty and whether it corresponded with the sample. These questions were submitted to the jury, and were really the only questions submitted to them, and as to them the decision of the jury cannot be disturbed.

I am of opinion, however, that the contract of sale was

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void by the statute of frauds. There was no part payment of the purchase-money, nor note or memorandum of the contract. Hence there was no compliance with the statute, unless the defendants both accepted and received the cloth purchased, or some of it. It was not sufficient to outrun the statute that the cloth was delivered to the defendants; they must also have accepted it. (*Cross agt. O'Donnell*, 44 N. Y., 661!) A delivery of property, to satisfy the requirements of the statute of frauds, must be a delivery by the vendor with the intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner. (*Brandt agt. Focht*, 3 Keyes, 409.) Judge WRIGHT, in *Shindler agt. Houston*, (1 N. Y., 269), says: "The last considered cases hold that there must be a vesting of the possession of goods in the vendee as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee so unequivocal that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold." In *Bell agt. Barnent*, (9 M. & W., 41), PARKE, B., says: "To constitute delivery the possession must have been parted with by the owner so as to deprive him of the right of lien."

In *Phillips agt. Bristotle*, (2 B. & Cr., 511), it is said *per curiam*: "In order to satisfy the statute there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with an intention of taking the possession as owner." In *Reid agt. Hutchinson*, (3 Bos. & Pul., 233), it was held that the acceptance must be an ultimate acceptance, and such as completely affirms the contract. In *Smith agt. Surmon*, (9 B. & Cr., 561), PARKE, B., says: "The latter cases have established that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to ob-

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ject to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part acceptance." (See also *Howe* agt. *Palmer*, 3 *B. & Ald.*, 321; *Howton* agt. *Armitage*, 5 *B. & Ald.*, 557; *Story on Sales*, § 276.)

Within the principles laid down in the above authorities there is not in this case any ultimate or final acceptance of the cloth by the vendees. Upon this point there is no conflict in the evidence. There was not sufficient opportunity to examine the cloth while it was in the store of the plaintiffs, and hence it was arranged that it should be taken to the store of the defendants and they were to examine it, and if they were satisfied as to the quantity and quality of the cloth, then they were to give their note for the purchase price. They did take the cloth and examine it, and after the examination refused to accept it. There is no evidence whatever that they ever accepted it or intended to accept it. Bliss, one of the plaintiffs, testified that Button, one of the defendants, at the time of the negotiation for the purchase of the cloth, stated that he could not examine the cloth where it was, and that it was the understanding that he should take the cloth and examine it all before the week was out, and then give defendants' notes for the same. Stone, another of the plaintiffs, testified that defendants were not ready to receive the goods then, but that the understanding was that they were to take them, and before Wednesday of the next week, examine them for the purpose of seeing whether they had the quantity and quality they bargained for, and were then to give their notes for them. Fay, also one of the plaintiffs, testified that he wrote at the bottom of the bill of sale, which was sent to the defendants, the words, "To be examined by Wednesday or Thursday of next week." We thus have the testimony of all the plaintiffs concurring that the defendants received the goods only for examination, and the testimony on the part of the defendants on the same points is still stronger. They did not take possession of the goods as owners, and it was not the intention of the parties

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that the title to them should vest in the defendants before they examined them and gave their notes. In other words, it was not an executed sale, and such was the view taken of the case by the judge at the circuit in his charge to the jury. He charged the following propositions: "If you find that these goods were warranted, and that they did not conform to the representations made by the plaintiffs, you will find a verdict for the defendants. If you find that the plaintiffs warranted the balance of the goods to correspond as to quality with the four cases shown to the defendants on the sale, and that those delivered did not so correspond, then the defendants were not bound to accept them." "If you find that the goods were sold by sample and that the bulk did not correspond with the sample, and further, that the defendants were induced to keep the goods over the week, or to continue the examination of the goods longer than they would have done but for the acts of the plaintiffs, then the defendants had a right to return the goods, and your verdict should be for the defendants." Although the defendants agreed to examine these goods within one week, yet if the plaintiffs requested them during the week to continue to examine more of the goods, then defendants were entitled to a reasonable time to make such further examination, and if such examination took more than the balance of week, the defendants were still entitled to return them, if, at the close of the examination, they proved to be inferior to the samples. It will be seen that "the judge treated this as an executory contract of sale, under which the defendants had the right to refuse to accept the goods if they did not conform to the warranty, in case the jury found one had been made." He assumed that the defendants had not accepted the goods, but he charged the jury in substance that if the defendants purchased without warranty then they were bound to accept, and if they purchased with a warranty and the goods conformed to the warranty, then they were also bound to accept. And if there was a warranty, and the goods did not conform to it,

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then the defendants were not bound to accept. It was plainly assumed by the judge that, upon some theory, there was a valid executory contract of sale, not that there was executed sale. Because if the defendants had accepted these goods and the title had vested in them, and the sale had thus become executed, the defendants would have had no right to return them for a breach of warranty, and escape entirely any recovery. In such case defendants would have been obliged to have retained the goods, and could only have recouped or counter-claimed their damages for a breach of warranty. That I am right in these observations, as to the charge, appears more clearly by the refusal of the judge to charge the following request of the defendants' counsel: "If you find the defendants never intended to, and did not, in fact, accept the goods delivered, then your verdict should be for the defendants."

To the refusal to charge, as thus requested, there was an exception. This shows quite clearly that the judge tried the case upon the theory of an executory sale, valid and binding (unless there was a breach of warranty) without acceptance. In this refusal to charge there was manifest error, because without acceptance there was no valid contract of sale, and the defendants had the right to reject and return the goods without any liability whatever to the plaintiffs.

Another view of this case will also show that the statute of frauds was not complied with. There was at least no such delivery of these goods as deprived the plaintiffs of their lien for the purchase price. When the goods were returned to the plaintiffs they claimed a lien on them for the purchase price, and refused to receive them except as lien-holders, and they sold them to satisfy this lien. And they claim, in this action, to recover the balance of the purchase price not satisfied by a sale of the property. It is unnecessary to inquire whether, upon the facts as they appeared upon the trial, the plaintiffs had this lien or not. They claimed it, acted upon it, and alleged it in their complaint. They cannot now be

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heard to deny it. The authorities above cited show that a lien for the purchase price is inconsistent with such a delivery and ultimate acceptance of goods as to satisfy the statute of frauds.

The judgment should, therefore, be reversed, and a new trial granted, costs to abide event.

"LOTT, *Ch. C.*, reads for reversal. All concur. Judgment reversed and a new trial granted, with costs to abide event."

LOTT, *Ch. Com.* : It must be assumed that the jury, under the instructions given to them by the court, have, by their verdict in favor of the plaintiffs, found either that there was neither an express warranty nor a sale of the goods by sample, or that they conformed to the warranty, if there was one, and corresponded with the sample exhibited, if the sale was by sample.

The defendants are, therefore, precluded from any relief on those grounds.

They were, however, entitled to have the jury instructed as asked in the ninth request or proposition submitted to the court.

Although the goods were delivered by the plaintiffs to the defendants, it was a question strongly litigated on the trial whether they were received absolutely as their property, or only for the purpose of ascertaining whether they conformed to the sample shown them. It appears to be conceded by the plaintiffs that the defendants were allowed a week to make an examination of them for the purpose of seeing whether any portion thereof was so defective as to entitle them, according to the custom of the trade, to make a return thereof, and have a deduction made on account of the same in the amount of the note to be given therefor. Under this conflict of evidence the defendants were entitled to have the question determined by the jury, whether the goods had in fact been "accepted" by them with the intention of taking possession as owner. The statute of frauds requires that

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"the buyer shall accept and receive" a part of the goods covered by the contract for the sale thereof.

The mere receipt is not a compliance with that requirement. There must be some act or conduct on the part of the buyer indicating and manifesting his intention in receiving them, to accept them absolutely and unconditionally in execution and full performance of the contract of sale. (See *Shindler* agt. *Houston*, 1 *Comst.*, 261, &c.; *Brandt* agt. *Focht*, 3 *Keyes*, 409; *Caulkins* agt. *Hellman*, 47 *N.Y.*, 449.

The refusal to charge, in conformity to the above request, was, therefore, an error, which calls for and requires a reversal of the judgment and a new trial, with costs to abide the event.

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SUPREME COURT.

MARY SWORDS, administratrix, &c., respondent, *agt.* WILLIAM EDGAR, *et. al.*, appellants.

In an action against the *owners of a pier* for personal injuries, resulting in death, it might be conceded that if the pier was in an unsafe condition at the time it was leased to lessees, some fourteen months prior to the accident, the lessees then being in possession, would not afford a defense against a claim upon the owners for such injuries, arising from such defect, and where there was no direct evidence as to the condition of the timbers at the time of giving of the lease, but it was assumed by the judge at the trial that it might be inferred from general knowledge of the length of time required for wood to become rotten, but in this case it could not occur in the time intervening between the making of the lease and the happening of the accident; and the only evidence upon the subject was that it would require the lapse of fifteen years before such timbers would become so rotten :

Held, that it was impossible that the conclusion reached by the jury, in finding for plaintiff, could be sustained by such evidence, and that the court erred in submitting the inquiry which he did to the jury.

The judge also erred in submitting to the jury the question whether the defendants ~~were in possession~~ of the pier when the accident occurred. The only evidence to support the submission of this inquiry was that the lease was executed some months after it was dated, and that the defendants' agent entered upon the pier and made repairs upon it a few months after it broke down. It was also in evidence, and undisputed, that the lessees were in the possession at the date of the lease, and from thence until it fell.

New York General Term, October, 1872.

THE plaintiff sued under the act of 1847, to recover \$5,000 for the death of her husband, who was a longshoreman, engaged on July 9, 1866, in discharging iron from a vessel unloading at Pier No. 11, North River. The iron overloaded the pier; it fell, Swords with it; he caught cold; it resulted in congestion of the lungs, and on July 18, 1866, he died. The appellants owned the south half of the pier.

Other defendants were sued, as to whom the complaint was dismissed.

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The jury found a verdict for \$3,500 against the appellants. They made a motion for a new trial, which was denied, and from the order upon that motion, and from the judgment, the appeal is taken.

On October 19, 1865, the appellants leased their half of the pier to the Commercial Steamboat Company for five years, from May 1, 1865 (the lessees were in possession from that date, under the preliminary arrangement), by a lease which provided that the pier should be "kept in order and repair, by and at the cost of the lessees."

During the whole term the pier was occupied under the lease; the appellants were at no time in possession. The rent was regularly paid, sometimes by the lessees, sometimes by others, under or for them, but always under the lease.

It was conclusively proved that the pier fell through the fault of the owners of the steamer "Mauritius," in making a storehouse for iron of the pier, the plaintiff's intestate being employed in discharging that vessel. About eighty-five or ninety car-wheels, weighing five hundred pounds each, and three tons of iron, raised after the accident by the witness, Henry F. Backus, thirty tons of iron that was not raised, and fifty more car-wheels, and thirty tons more of iron, raised by the Coast Wrecking Company, or about ninety-eight tons of iron were placed on the bridge part of the pier, and crushed it in, falling with it into the water.

The pier was not a new pier. The only witness for plaintiff to its condition was another longshoreman, who testified that the dock gave a crack, the timbers broke off, and that he subsequently examined the timbers, and found them rotten as dirt. He would not, on cross-examination, say he saw two beams that were rotten; said that there were so many timbers underneath the dock that you could not tell whether they were placed on piles or not, and that from fifty to sixty feet in length broke. The other witness for plaintiff on the subject swore that only five to six feet in length fell; no other witness testified to any want of sound-

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ness of the pier; and against this testimony was the evidence of the dock builder who repaired the pier, the stevedore who for twelve years had done business on the pier, another stevedore who, at the time of the accident, was engineer on the pier, and the wrecking company's agent, who raised part of the iron, all of whom proved the overloading, and proved that though there was a little necessary surface-rot from fresh water, where the plank rested on the cross-pieces, the beams were perfectly sound, and one of whom testified that in the morning of the day the pier fell, he notified the foreman under whom the plaintiff's intestate was working, that he was getting too much iron on the dock.

As the appellants had no legal right during their lease to enter in order to make repairs, and as they had required their lessees to covenant to keep the pier in repair, it will be seen how great is the hardship that on such evidence of the condition of the pier the jury should have gratified their sympathy for the plaintiff at the appellants' expense.

The appellants moved for a nonsuit, and presented certain requests to be charged by the judge, and the exceptions to the rulings in these respects, and to certain principles charged to the jury, raise the other questions presented by the appeal.

The case was submitted to the jury upon substantially these propositions, of which the appellants complain, and which, it is urged, amounted to little less than a direction of a verdict.

1. That the appellants were responsible if the pier were out of repair on May 1, 1865, from which date the lease took effect.

2. That though there was no evidence of the condition of the pier at any other date than that on which it fell, "we all know, from our common experience, that wood does not materially decay between May 1, 1865, and July 11, 1866."

3. That it was not contended that the condition of the pier on July 11, 1866, was materially different from what it

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was on May 1, 1865, though there is nothing in the case to warrant the assertion, and on the contrary, appellants requested the court to charge that there was no evidence of want of repair at the execution of the lease.

4. That not only was the fact of the lease no defense, if the jury found want of repair at the beginning of the term, but that it was for the jury to say, on uncontradicted evidence, who was in possession on July 11, 1866.

5. And the judge then charged, that if on July 11, 1866, the pier were out of repair, the plaintiff was entitled to a verdict, without any qualification in respect to who was in possession under the lease, or whether such want of repair had or had not arisen during the lease.

JOHN E. PARSONS, *for appellants.*

I. The only witness in reference to the lease was William Cruikshank, appellants' agent. This evidence was not controverted; it established the lease; that from the beginning of the term the lessors were out of possession, and that there was continuous possession under the lease during the term, by or under the lessees, who paid all the rent.

The lease had on it the pencil indorsement, signed by no one, the handwriting of which was not proved, "ejected November 16, 1866," four months after the accident. After the accident Mr. Cruikshank employed the dock builder to repair the lease, and compromised the claim against the lessees for the repairs, at fifty per cent. It was proved that there was no ejectment, even in November, and yet upon this evidence the judge left it to the jury to say who was in possession on July 11, 1866. It cannot be shown that the verdict did not proceed upon this point, it is unsustained by any evidence, and equally upon that ground as of the error in leaving the question to the jury should the verdict be set aside.

II. The lease, with a full covenant by the lessees to keep,

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the pier in repair, relieved the appellants (the lessors) from liability. It will not be contended that an absolute deed would not put at end all such liability. During the term the lease just as effectually put it out of the power of the lessors legally to enter to make repairs, and made the lessees owners *pro hoc vice*. The lessee controlled the use, and danger was due not to the fact, but to the use of the pier. If the lessee suffered the pier to be used, it was at his peril that he permitted it to be in dangerous want of repair. The lessors had no power to permit or refuse the use, and so could not be charged with any duty to those who did use it.

In *Rodway* agt. *Riggs* (37 N. Y., 256), the lessee was held liable, and in its opinion the court of appeals says, that by a covenant similar to that in this case, the city (the lessors) exercised due care on its part.

III. The appellants were none the less freed from liability if the pier were out of repair at the beginning of the term.

The judge held otherwise, on the authority of *Moody* agt. *The Mayor, &c.* (43 Barb., 282). In that case the pier was so built that logs of wood projected under the surface of the water, hidden from sight in such manner that the plaintiff's vessel was caught upon them, and became a total loss; and the liability was put by this general term upon the defective construction of the pier, for which the owner is responsible, and the removal of which did not come within the lessees' covenant to keep in repair.

Congreve agt. *Smith*, and *Congreve* agt. *Morgan* (18 N. Y., 79 and 84), were cases where one who himself made an excavation in a street, was made liable for failure to keep it properly protected.

In *Cannovan* agt. *Conklin* (1 Abb., N. S., 271), the common pleas general term assumed that the lessor is not liable but held the defendant, because he reserved a right of possession to himself in the part of the pier, the condition of which caused the injury.

IV. It was error for the judge to instruct the jury, as sub-

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stantially he did, to assume that the condition of the pier was the same on May 1, 1865, as on July 11, 1866. Open and exposed to the elements as it was, there was no necessary impossibility that the pier should be in repair on May 1, 1865, and become out of repair during the fourteen months to July, 1866. However difficult to determine when it was, there was but an instant between the time when the pier was in repair and the time when it became otherwise; and what justified the learned judge, upon mere conjecture, to determine that that instant of time was not between the two dates?

V. It was certainly error for the judge to charge that it, the pier, fell from defective condition at the time, the appellants were, on that state of facts, alone responsible.

That was to hold that if the pier were well constructed, and in thorough repair at the beginning of the term, still the lessors remained liable; or, in other words, that under all circumstances must the liability of a pier owner continue.

VI. It is to be observed that the covenant in this case requires the lessee to keep the pier in order and repair. A pier is rented by a lessee to use as a pier, and a covenant on his part to keep it in good order and repair, requires that it shall be kept in suitable condition for such use, and effectually devolves upon him the duty to prevent use when the pier is in unsuitable condition.

VII. The judgment should be reversed.

IRA D. WARREN, *for respondents.*

I. The defendants' counsel requested the court to charge, "That there was no evidence of any want of repair at the execution of the lease."

This action was against the owners and not the lessees. The evidence showed that the timbers were rotten, and that it would take ten or fifteen years for them to rot in that situation; hence there was evidence to show that they were

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rotten when the lease was made in 1865. The defendants leased a rotten pier, and received rent for its use, and hence are liable for all damages resulting therefrom.

They furnished the means for the infliction of the injury, and are liable as well as the tenant. (*Anderson* agt. *Dickie*, 1 *Robt.*, 245; *Vandenburg* agt. *Truax*, 4 *Denio*, 464; *Thomas* agt. *Winchester*, 6 *N.Y.*, 397.)

If the injury resulted from the negligence of the owner, either in constructing or upholding the freehold, he is liable, and cannot, by letting, divest himself of such liability. (*Eakin* agt. *Brown*, 1 *E. D. Smith*, 43; *Goodley* agt. *Hagerty*, 20 *Penn.*, 389.)

"The entire surrender to a lessee does not relieve the owner from liability to third persons for defects which existed in it when he parted with its control. Nor yet would he be protected by a contract on the part of the hirer to repair such defects, for the mere relation of letter and hirer has no quality which enables the latter to evade responsibility for his own acts, by referring persons injured thereby to a third party for relief." (*Sherman & Redfield on Negligence*, § 502; *Moody* agt. *The Mayor, &c.*, 43 *Barb.*, 282; *Davenport* agt. *Buckman*, 37 *N. Y.*, 568; *Fish* agt. *Dodge*, 4 *Denio*, 311; *Benson* agt. *Suarez*, 19 *Abb.*, 61.)

"The defendant constructed a sewer through his own property, which was not made with proper care; subsequently he leased the premises to the plaintiff, and afterwards the sewer burst. Held that the owner was liable." (*Alston* agt. *Grant*, 3 *El. & B.*, 128.)

The jury found that the timbers of this pier were rotten and dangerous at the time the lease was made, and were sustained by the evidence in so finding, as it would take from ten to fifteen years for them to rot, and had only been used one year.

Again, a pier in the city of New York is a public street.

If it is, the same doctrine applies that applies to any person using a part of the public street for his own purposes

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he is bound to keep it safe. (*Congreve* agt. *Smith*, 18 N.Y., 79; *Congreve* agt. *Morgan*, 18 N.Y., 84; *Dygert* agt. *Schenek*, 23 *Wend.*, 446.)

II. The first exception to the charge is not well taken. The condition of the pier on the 1st of May, 1865, was a material point in view of the cases before cited. The evidence on that question was conflicting, and the court was correct in submitting it to the jury.

The second exception is not well taken. There was some evidence that notwithstanding the lease the defendants were actually in possession of the pier at the time. They repaired it after the damage. They were, at that time, negotiating to lease it to Johnson & Higgins. The lease contained a memorandum that the tenants were ejected in 1866, also that the lease was dated back.

The third exception to the charge has been discussed under the first point.

The fourth exception is not well taken. There was no evidence showing any change in the condition of the pier from the date of the lease to the time of the accident.

The last exception was not well taken, for the reason that the only witness who testified on the subject said that such timber would not decay, as this was in from ten to fifteen years.

III. It is not necessary to give evidence of any pecuniary loss in these cases to enable the next of kin to recover. (*Baron* agt. *R.R. Co.*, 5 *Wallace*, U.S., 90; *Oldfield* agt. *H. R. R. Co.*, 14 N.Y., 310, 318; *McIntire* agt. *N. Y. C. R. R. Co.*, 37 N.Y., 287.)

IV. We ask that this judgment be affirmed with costs.

By the court, LEONARD, J.—It must be conceded that if the pier, where the accident occurred, was in an unsafe condition at the time it was leased, May 1, 1865; that the possession of the pier by other parties, under a lease from the defendants, will not afford a defense against a claim upon them for injury arising from such defect.

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The question of the condition of the pier at this time was submitted to the jury, and an exception thereto was taken by the defendants' counsel.

The accident occurred in July, 1866, and an examination afterwards proved that timbers, not previously in sight, were very much decayed. There was an unusual weight of freight placed upon the pier, but the accident would not have happened had these timbers been sound.

There was no direct evidence as to the condition of the timbers May 1, 1865, when the possession was delivered to the tenant, but it was assumed by the learned judge that it might be inferred from general knowledge of the length of time required for wood to become rotten.

It was said by the judge in substance that it could not occur in the time intervening between the making of the lease and the happening of the accident. The only evidence bearing upon the subject was that it would require the lapse of fifteen years before such timbers would become so rotten.

I think it was impossible that the conclusion reached by the jury can be sustained by such evidence, and that the court erred in submitting the enquiry which he did.

The timbers might have been sufficiently sound when the lease was made, to have sustained the weight under which they broke, and precipitated the plaintiff's intestate into the water, inflicting the injury which caused his death in July, 1866.

At least, we can know nothing to the contrary as a fact.

There is no such general law of nature as will possess the court and jury of the proper knowledge to pass upon the soundness of the timbers, or their capacity to sustain the weight required, from the facts proven.

The judge erred in his instructions upon this subject.

The judge submitted to the jury the question whether the defendants were in the possession of the pier when the accident occurred.

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The only evidence to support the submission of this inquiry was that the lease was executed some months after the date, and that the defendants' agent entered upon the pier and repaired it a few months after it broke down.

It was also in evidence, and undisputed, that the lessees were in the possession at the date of the lease, and from thence until it fell. Also, that the defendants claimed the expense of these repairs from the lessees, which they compromised at fifty per cent., being liable, under a covenant, in the lease for repairing.

There is nothing inconsistent in these circumstances, upon which the plaintiffs rely to sustain the proposition, that the defendants were in possession, with the opposite conclusion.

The evidence is not sufficient to authorize the submission of the question.

The jury may have based their verdict upon an erroneous finding as to this fact of possession.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

Crosby agt. Brown.

SUPREME COURT.

ADON D. CROSBY and another, agt. FRANK C. BROWN.

On an appeal from an order of the county court, in a cause originating in a justice's court, on a case and exceptions for a re-trial in the county court, which is granted by the county court, and thereupon an appeal is taken from this last order (or judgment) of the county court to the general term of the supreme court, where the order of the county court is reversed, the successful party is not entitled to any costs of the last appeal. It would make no difference that judgment was entered upon the order. (*Following the decision of the case of Woodbury agt. Morton, ante p. 56.*)

Fourth Department, June, 1872.

JOHNSON, P. J., TALCOTT & BARKER, J.J.

AN appeal from an order, made at special term, denying a motion for re-adjustment of costs.

The action was commenced in justice's court, where the plaintiffs had a judgment. The defendant appealed to the county court, where a re-trial was had before a referee, and the plaintiffs again recovered. The defendant then applied to the county court on a case containing exceptions for a new trial, and the same was ordered with costs to abide the event. The plaintiffs appealed from such order to the general term of the supreme court, and the order appealed from was here reversed.

The memorandum of the decision of the general term, as filed with the clerk, was in these words under the title of the cause, "Judgment of county court of Cattaraugus reversed and that of the referee affirmed."

The clerk, taxing the costs on this appeal, allowed \$20 before argument and \$40 for argument, one term fee \$10, making and serving amendments to case \$10. Disbursements

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were taxed at \$81.95, two of the items being for printing the papers used on appeal, and were taxed at \$76.50. The entire bill amounted to \$161.95.

The defendant appeared before the clerk, and objected to the taxation of all of the said items, on the ground that the plaintiffs were not entitled to any costs on the appeal from the order, and in no event should the plaintiffs be allowed more than \$10, and that he was not entitled to that, for the reason the same had not been specially awarded by the court.

The clerk taxed the bill as presented. The defendant moved the special term to set aside the same, and the motion was in all things denied, and the taxation by the clerk upheld.

The defendant appeals to this court from that order.

D. H. BOLLES, *for appellant.*

WM. H. HENDERSON, *for respondents.*

By the court, BARKER, J.—The disposition to be made of this appeal is determined by the case of *Woodbury agt. Morton*, (*ante p 56.*)

In that case the cause originated in justice's court, and was re-tried in the county court on appeal. A new trial was granted in the county court upon a case containing exceptions. An appeal from such order was taken to the general term. It was held that the successful party on that appeal could not recover costs as allowed by sub-division 5 of section 307 of the Code. That it presented a case coming within the exceptions enumerated in same sub-division. That the appeal is under sub-division 2, section 344. In that case the motion in the county court for a new trial was made before judgment was perfected on the verdict. In this instance the motion for a new trial was after judgment on the report of a referee. To our minds this circumstance does not make the cases dissimilar so far as the question of costs is concerned. In this case, as in that, the appeal is

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from an order and not from a judgment. The question presented is in the very terms of the exception contained in the section above cited. There is no room left for construction, for it cannot be fairly said that the legislature did not intend just what is so plainly stated.

We are referred to the case of *Williams* agt. *Murray*, reported in (32 *How. Pr. Rep.* 187,) as an authority, in support of the bill of costs as allowed. The section of the Code under consideration has been amended since that adjudication, and it is not in point.

By section 344, provision is made for an appeal from judgments rendered in the county court and also from orders entered in the same court.

By this appeal from an order setting aside the judgment and ordering a new trial, the record of the judgment in the county court was not brought into this court, nothing more than the bill of exceptions and the order appealed from were properly before this court.

The order of this court reversing the order of the court below left the judgment of the county court in full force and effect. Judgment of affirmance to be entered in this court is unnecessary. The memorandum of this court, entered by the clerk, indicates, it is true, that such a judgment was directed by this court, but it is manifest that the real order intended was simply to reverse the order appealed from. At least that is all this court had power to do.

The court did not award costs in disposing of the appeal, so the plaintiff is not entitled to the usual motion costs.

The order of the special term is reversed and a re-taxation ordered, striking out all costs on appeal to this court.

No costs awarded to the appellant.

Luft agt. Graham.

N. Y. COMMON PLEAS.

JOHN LUFT and others, agt. CHARLES GRAHAM and others.

Where it became the duty of the appellant's attorneys to see that the cause was restored to the calendar of the general term, as part of the conditions upon which they were relieved from a former default—which they did not do; and the respondent's attorney in accordance with that order, finding it omitted from the calendar on the 1st day of the October general term, procured it to be restored, and some days afterwards it was regularly called to a judgment of affirmance by default:

Held that this action was regular, and in consideration of this being a second motion by the appellants to be relieved, it was proper that the court look into the merits presented by the justice's return.

Held, also, that the testimony in the court below warranted the justice, notwithstanding the form of the note, to find that the note was indorsed by the appellants for the accommodation of McKenzie, one of the defendants, and for the purpose of enabling him to procure a release of his wagon from the plaintiffs' lien. Under such circumstances their liability as accommodation indorsers is well established by the court of appeals in *Moore agt. Cross*, (19 N. Y., 227.)

A DEFAULT was taken at the May general term, which was opened by consent, the case to be restored to the calendar and argued that term. The case was so restored by respondent's attorney and appellants, and respondent waited during the May term for the appeal to be heard; the case came within three or four of being reached when the general term adjourned.

The next general term, October, respondent's attorney, not finding the case upon the calendar, calls the attention of the clerk to the fact, who discovers his mistake and places the appeal upon the calendar No. 147c. This is done after the calendar of the general term is called through, appellants' attorney being present, and not hearing the case called, concludes it is not upon the calendar and goes away. Several days afterwards the appeal was reached, and upon the refusal of the judges to postpone so that appellants could

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be notified, or that the cause go over the term, a second default was taken and judgment entered, which appellants moved to vacate for irregularity, upon the grounds that the case was not on the calendar for said term on the first day of the term; that said cause was not regularly placed on the calendar for said term, no consent having been obtained, and no notice of motion to place said cause on the calendar having been given, and no motion to place said cause on the calendar for said term having been made.

JOHN L. and WILLIAM LINDSLEY, *for defendants, appellants.*

GEORGE F. LANGBEIN, *for plaintiffs, respondents, cited:*

Section 364 of the Code of Procedure, and contended that even if the default should be opened as a matter of justice, there were no merits in the appeal, which a glance at the return of the justice would show, and cited *Moore agt. Cross*, (19 N. Y., 227.)

ROBINSON, J.—It was the duty of the appellants to see that the cause was restored to the calendar of the general term as part of the conditions upon which they were relieved from a former default. This they neglected to do, and respondents' attorney, in accordance with that order, finding it omitted on the first day of the October general term, procured it to be so restored, and some days afterwards it was regularly called to a judgment of affirmance by default.

I regard this action as regular, and in consideration of this being a second motion to be relieved, regard it but proper to look into the merits presented by the justice's return.

The note upon which a recovery was had was given by the defendant, McKenzie, to plaintiff for repairs they had done to his wagon, and on their refusal to surrender their lien on it except upon the security of a good indorser.

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Upon this consideration the note in suit was given by McKenzie with the indorsement of the appellants, a credit of two months being allowed. Instead of note being drawn to the order of the appellants, it was in terms made payable to the order of the plaintiffs. The testimony warrented the justice, notwithstanding the form of the note, to find that the note was indorsed by the appellants for the accommodation of McKenzie, and for the purpose of enabling him to procure a release of his wagon from the lien. The appellants, though seeking to avail themselves of a legal cavil that their names would appear as second indorsers, and their private intention was to make an indorsement to strengthen the note, do not deny their knowledge of the object for which the note was given, nor do they pretend they communicated to plaintiffs any intention to limit their responsibility as accommodation indorsers for McKenzie, with the sole view of obtaining, on the indorsement, a release of the property from respondents' lien.

Under such circumstances their liability is well established by the court of appeals in *Moore* agt. *Cross*, (19 N. Y., 227.)

Their appeal is without merits, and this application to be again relieved from a fault must be denied with \$10 costs.

Rudolphy agt. Fuchs.

N. Y. COMMON PLEAS.

JOHN RUDOLPHY agt. PETER FUCHS *et al.*

In an action for damages for negligently allowing a croton water pipe, by bursting, or otherwise, to wet and do damage to goods and building situated in the third story of a store occupied by the defendant, the plaintiff at the same time occupying the first floor and basement.

And it appearing from the evidence, which was submitted to the jury, and upon which they found a verdict for the plaintiff, that in respect to the question of negligence that the plaintiff was quite as much the producing cause of the accident in not having shut off the water in his basement when the store was locked up and left for the night, as the defendants were by having a pump in the third story—the packing of the piston rod of which was so worn as to admit the croton to pass up through it, a fact of which they may have been and probably were entirely ignorant, or in other words, that the plaintiff's negligence in this aspect of the case is as great in degree as that of the defendants.

It seems, from the evidence, to be a case presenting the question of co-operative, mutual, or contributive negligence, which question the courts are usually exceedingly indisposed to take away from the jury, but when it is clearly defined and as palpable as it is in this case, it is a pure question of *law*, and no verdict of a jury can make it otherwise.

October Term, 1872.

DALY, C. J.—The jury was properly instructed in respect to the law, and it was for them to determine how the injury arose. They were warranted by the defendants evidence, in finding that the pump on the third story was out of order. The defendants witness, an expert, the plumber, was of the opinion that the water came through the packing box of the pump. He testified that each pump upon the top has a piston rod, and that the packing is made of tallow and cotton, that sometimes the packing gets worn out, and that the croton water, where that is the case, will force itself out at night, as at night it would rise to the third story. He was not asked by either party if he found the packing of the piston rod worn out, or if he had, in fact, examined it.

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The presumption, however, is that he did it, as he expressed, that the leak, or more properly overflow, must have been from the packing box, and that it was in that state is further indicated by the fact that the defendant's servants were unable to pump up any water for use in the third story and had to carry it up in pails. It may have been negligence on the part of the defendants to have a pump in this defective state, through which the water would rise at night, the pressure at that period being much greater than during the day, when the water is drawn off for use in all quarters of the city. This was probably the way in which the accident occurred, as the water was found in the morning in the third, second and first stories, and in that part of the building in which it would be if, as indicated, it flowed up through and over the packing box of the pump. The pump was connected by a pipe, with a tank in another part of the floor where water was kept to supply water closets and wash basins on the third and second floors, but the plumber found no indication there of a leak in the pipes or the tank, or of any overflow out of or through the wash basin or closet, and there was no proof given by the plaintiff to contradict the statement of the plumber, that he found the plumbing work all in good order; that he had no occasion to make any repairs or to do any work except to disconnect the pipes, and blow through them to ascertain if any of them leaked, or his further statement that the place around the pump was wet and that there was no water in that part where the tank, the wash basins and the water closets were placed. The plaintiff's porter testified that he shut off the water at the main pipe in the basement before leaving the store the previous evening, that he did not do it every evening; but he generally did and was sure that he did so that night. If he did, the accident could not have occurred, as the plumber conjectured by the water rising in the building during the night and passing through and out of the pump at the packing box, and then the plaintiff's case would fail altogether, as

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it would do, without any proof as to how the accident originated, except some evidence, to which I shall hereafter refer, or any evidence to show how the water came to flow over the floor of the third story, and in a greater degree over the second floor and down into the plaintiff's store, producing the damage, to recover for which he sued the defendants.

In actions of this nature, the *onus* is throughout for the plaintiff to establish that the injury arose from the defendant's negligence. See this question carefully examined in an article in the *American Law Review* for January, 1871, and the authorities there cited, and if the case is to rest upon the statement of the porter, then it is a case of loss and damage by croton water, without any proof of what was the cause of it, except the evidence to which I shall hereafter refer.

But this is always more or less a suspicious and weak kind of evidence, as subordinates are rarely willing to admit the injuries for which the employer is responsible occurred by their negligence, especially in respect to matter resting more particularly within their own knowledge, and upon which it is generally difficult and may be impossible to contradict them directly. But the probability or truth of their statement, no matter how positively it is sworn to, may always be weighed by the jury in connection with the general facts of the case, or tested by the impression which the whole of the evidence makes upon them, when it is all before them. Thus in the present case, if the jury were satisfied of the truth of the statement of the plumber, they would be warranted in drawing the conclusions that the water was not shut off that night, and that the porter was either mistaken or had stated what he knew to be untrue. He admitted that he did not shut it off every evening, but that he did so generally, and was sure that he did so that night, which may after all have been his impression and honest belief, when in reality the fact was not so. If we could assume that the jury found the fact to be as he stated it, then the verdict which they gave against the defendants would be erroneous,

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for it would divest the case of any explanation of the origin of the accident, except as I shall hereafter state, or of any evidence that it was caused by the negligence of the defendants or their subordinates. But if we assume as we might do in support of their verdict, that they found that it was produced by the water rising up in the night and running out through the pump, and that it was an act of negligence for the defendant to have a pump in so defective a state that the water rising at night would pass through it and flow the floor, that would not relieve the difficulty that exists in this case, for then the question arises whether it was not co-operative or contributive negligence on the part of the plaintiff, not to have had the water shut off that night in the basement, as that was his general practice or that of his porter. The plaintiff occupied the first floor or store, and the basement, and if, as the porter testified, he generally shut off the water before leaving at night, there must have been some reason for so general a practice. The plaintiff testified that he directed the porter to do this, and either he or the porter must have adopted it from a sense of its propriety or necessity, and if the accident occurred in the way which the plumber supposed, there was a necessity for this practice, as the defendants had a pump in the third story to enable them to keep water in the tank for the supply of water-closet and wash-basin upon that and the second story, an arrangement rendered necessary by the fact which was proved in the case that the water of the croton did not ascend as high as these stories throughout the day, and hence the necessity of having a tank in the third story filled with water that the defendants might use during the day in the water-closets and wash-basins, which had been placed in the second and third stories. A pump was a necessary part of the arrangement, and as the packing in the piston-rod of a pump is liable to get worn, it was necessary to avert the possibility of an accident from this cause at night, when the store was closed and the inmates had left, and of its pro-

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ducing serious damage, that the water should be shut off when the store was locked up.

Whether the porter generally did this by the plaintiffs' direction, or as the result of his own observation, is immaterial, as in either event it was a precautionary measure, for there was no occasion for shutting off the water at the main pipe in the basement generally every night, unless something was apprehended by leaving it open. He says that he did it generally, but not every evening; that by doing it generally he regarded it as embraced within his duties, and yet discharged this part of them so negligently that he occasionally omitted doing it. If the accident occurred from this cause, then it would never have happened if the porter had done that evening what he was generally in the habit of doing, and it follows from this in respect to the question of negligence, that the plaintiff was quite as much the producing cause of the accident, in not having shut off the water in his basement when the store was locked up and left for the night, as the defendants were by having a pump in the third story, the packing of the piston of which was so worn as to admit the croton water to pass up through it, a fact of which they may have been, and probably were, entirely ignorant, or in other words, that the plaintiff's negligence in this aspect of the case is as great in degree as that of the defendants.

In whichever of these two points of view, therefore, the case is looked at, the same result must follow. If the water was shut off from the basement that night, then there is nothing in the case except the evidence to be referred to, to show how the accident originated, or to prove that it arose from negligence on the part of defendants; whilst on the other hand, if it were not shut off, and the accident happened by the water rising up and flowing out of the box of the pump, then it was co-operating, mutual, or contributive negligence on the plaintiff's part, to omit that what he or his porter had been generally in the habit of doing.

Courts are usually exceedingly indisposed to take away

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the question of co-operative or mutual negligence from the jury, but when it is clearly defined and as palpable as it is in this case, it is a pure question of law, and no verdict of a jury can make it otherwise.

I come now to the evidence to which I have referred. One of the plaintiff's witnesses testifies that he saw the water coming from a pipe on the second floor; that the pipe had burst and that the water was coming from the pipe, which was a small one, near a stop cock.

It is remarkable that none of the other of the plaintiff's witnesses saw this. The plaintiff himself was evidently under the impression that the pump was the cause of the injury. He was not sure whether it, the pump was in the second or the third story, but the fact that it was in the third story was distinctly proved by the defendants, as also the fact that there was water on the floor of the third story, and that it was not around the pump. These facts were not controverted, and if this witness saw water flowing from a pipe that had burst in the second story, no explanation was given of the circumstances that the third story was wet as well as the second. But even if this witness saw what he said he did, that the water was flowing from a pipe that had burst in the second story, that would not suffice to show negligence on the part of defendants, unless the bursting of the pipe was from some defect in it for which the defendants were answerable, or through some neglect on their part which caused it to burst. It was in winter, in the month of January, and lead pipes burst from many causes—the gnawing of rats, the state of the weather, &c., or other causes, for which the proprietor or occupants of buildings are not answerable. If the finding of the jury, therefore, rests upon the statement of this witness, it could not be supported without some additional evidence showing that it was through the defendants' negligence that this pipe burst, and there is no such evidence. I am therefore of opinion that the judgment should be reversed, and a new trial ordered.

Hathaway agt. Warren.

SUPREME COURT.

HATHAWAY agt. WARREN.

A county judge has power under the Code, to continue on the return of an order to show cause, an injunction order made by himself *ex parte* in an action in the supreme court.

(This is adverse to *Middletown agt. Rondout, &c., R. R. Co. at special term, 43 How., 144, affirmed at general term, 43 How., 481.*)

Monroe Special Term, Sept., 1872.

JAMES C. SMITH, J.—This is a motion to vacate an order made by the special county judge of Monroe, continuing an injunction order made by the same judge, *ex parte*. The *ex parte* order contained a clause requiring the defendant to show cause, before the judge who granted the order, at a specified time within ten days, why the same should not be continued. At the time fixed, both parties appeared before the judge and argued the motion, and thereupon he made the order which is now sought to be set aside.

The counsel for the defendant contends that the order continuing the injunction is void for the reason that a county judge has no power to make an injunction order, on notice, in an action in this court. In support of his position, he cites the case of *Middletown agt. Rondout and Oswego R. R. Company*, decided at the Albany special term, in February last (43 *How.*, 144), and recently affirmed at general term in the third department. (*Id.* 481). In that case, the court, at general term, in their published opinion, do not discuss the question now in hand. They cite the case of *Parmenter agt. Roth* (9 *Abb., N. S.*, 392), *Rogers agt. McElhone* (20 *How.*, 441), and *Merritt agt. Slocum* (3 *How.*, 309), and evidently

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rest their decision upon them, so far as it affects the present question. Neither of those cases relates to an injunction order. The point decided by them is, that under section 403 of the code, a county judge has not power to make an order, on notice, in an action in the supreme court. But those decisions were obviously intended to be understood as having no application to cases where the code has expressly provided otherwise. By the express terms of section 403, the powers it confers, to wit, the powers of a judge of the supreme court at chambers, are "in addition" to the powers conferred by the code upon a county judge, in an action in the supreme court. The section does not take away or limit any power specially conferred by other sections, but gives a general power in addition to those specially conferred. The question of the extent of the power given by the separate chapter of the code relating to injunctions was not presented in either of those cases, and was not considered. That being the case, the general term decision above referred to, having been made by a divided court, can hardly be considered a controlling authority upon the question. The able judge who decided the Middletown case at special term, discussed very fully the question now before me, but I am unable to concur in his views.

Sections 218 to 226 of the code, constituting a separate chapter, relate exclusively to injunctions, and establish certain rules by which the granting of them is governed. Section 218 abolishes the writ of injunction, as a provisional remedy, and substitutes for it an injunction by order, and it confers power to make the order upon three distinct tribunals or authorities, namely, the court in which the action is brought, a judge thereof, and a county judge. The like power is conferred on each of the three authorities; that is to say, the power of a county judge to grant an injunction order, is, (within his county), co-ordinate and co-extensive with that of a justice of this court, and that of the court itself. And by the act creating the office of special county

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judge in Monroe, that officer has all the powers of a county judge at chambers (*Laws* 1864, *Ch.* 368, *p.* 860).

The succeeding sections relate to the extent of the power and regulate the exercise of it. Section 219 describes the cases in which an injunction order may be made. By section 220, it may be granted at the time of commencing the action, or at any time afterwards, before judgment. This section and 218 indicate that the chapter relates to preliminary or temporary injunctions, and not to those which are final or cotemporaneous with the judgment. And so it has been held (3 *Code R.*, 165 ; 5 *How.*, 188 ; 4 *Sandf.*, 374 ; 4 *Duer*, 200). As the like power is given to each of the three authorities it necessarily follows, that each has power to grant an injunction order at any time, from the commencement of the suit to the perfecting of judgment, and which may operate till judgment, except as otherwise specially provided in subsequent sections. Section 221 limits the general power previously granted, by providing that an injunction shall not be allowed, after the defendant shall have answered, unless upon notice, or upon an order to show cause ; but in such case the defendant may be restrained until the decision of the court or judge, granting or refusing the injunction. Section 222 provides that where no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff. Section 223 is in these words : " If the court or judge deem it proper that the defendant or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place, why the injunction should not be granted ; and the defendant may, in the meantime, be restrained."

I cannot doubt that these three sections apply to each of the authorities named in section 218, and regulate the power there conferred. As to one of them, to wit : section 222, which requires an undertaking, there is no question whatever. It

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applies to every court and to every judge having power to grant an injunction order. The words, by force of which it has that application, are these: "the court *or judge*." Precisely the same words are used in sections 220 and 221, the latter of which provides for notice of an application for injunction after answer, and in section 223, which provides for an order to show cause, in the *discretion* of "the court or judge," whether before or after answer. What reason is there for saying that the words "the court or judge," in sections 221 and 223, do not include a county judge, and that the same words in section 222 do include a county judge.

If sections 221 and 223 were intended to refer exclusively to a judge of the court in which the action is brought, it was easy for the legislature to say so, in unmistakeable terms, as they did say in section 224, which provides that an injunction to suspend the general and ordinary business of a corporation, shall not be granted, except by the court, that is, the court in which the action is pending, or a judge *thereof*. The language there used shows clearly, that in the particular class of cases provided for in that section, a county judge cannot grant an injunction order, except in an action in his own court. This limitation of the word "judge," in a single instance, indicates the intention to include both classes of judges mentioned in section 218, whenever the word is used in the same chapter without terms of limitation or exclusion.

The above construction derives support from section 225, which provides that if the injunction be granted by a judge of *the court, or* by a county judge, *without* notice, the defendant, at any time before the trial, may apply upon notice, to a judge of the court in which the action is brought, to vacate or modify the same. This language seems to imply that a county judge, as well as a judge of the supreme court, *may* grant an injunction, *on notice*, in an action in this court. Section 226 throws no light on the question.

Looking beyond the words of these sections to the nature of the remedy intended to be provided, the construction

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seems equally plain. It is essential to the proper exercise of the responsible power of granting injunctions that every court or judge in whom it is vested, should have power, in his discretion, at least, to hear both sides, before granting an injunction which may operate *pendente lite*. Precisely that discretionary power is conferred by section 223. So long as county judges, in common with justices of this court, are vested with power to grant injunctions, no reason is perceived, why they should not be permitted, as well as justices of this court, to hear what is to be said against the application, before deciding it. The mischiefs resulting from an abuse of the power to grant injunctions *ex parte*, led to the adoption of rule 94, by which the exercise of the discretionary power given by section 223 is made imperative, in all cases.

The adoption of rule 94 furnishes an additional argument in favor of the construction above stated. If a county judge has not power to grant an injunction, in an action in this court, on notice, or on the return of an order to show cause, as provided in sections 221 and 223, the enforcement of that rule will lead to more inconsistent results.

Under rule 94, every *ex parte* injunction order must contain an order to show cause. But rule 46 provides that an order to show cause shall be returnable only before the judge who grants it, or at a special term appointed to be held in the district in which such judge resides. Under that rule, as was remarked by Justice E. D. SMITH, in his well considered opinion in *Harold agt. Hefferman* (42 How., 241), it has uniformly been held, that a county judge cannot make an order returnable in the supreme court. It follows that if he has not power to entertain a motion for an injunction on the return of an order to show cause made by himself, the new rule, 94, takes away from him a power clearly conferred by section 218, namely, the power to grant an *ex parte* injunction order, in an action in this court. But the rule was not intended to abrogate a jurisdiction given by the code,

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and could not have that effect, if it was intended. The rules of court must be consistent with the code (§470).

These inconsistent results would follow from the construction of the provisions of the code respecting injunctions contended for by the defendant's counsel. The better view of the matter is, that county judges have now, as they have always had, under the code, a co-ordinate power with justices of this court to grant injunctions; that rule 94 applies to both classes of judges and regulates their powers, but does not abrogate them; and that by its operation, the only effect of an *ex parte* injunction order, whether granted by a justice of this court or by a county judge, is to bring in the defendant to oppose a motion for an injunction, and to restrain him in the mean time. Thus applied, the rule is a more salutary one, it is not incongruous or inconsistent with the provisions of the code, and it leaves the powers of county judges the same as they were before its adoption, except as it has regulated the practice in all cases.

If I apprehend correctly the facts in the Middletown case, that portion of the opinion of Justice LEARNED, which is at variance with the views above expressed, was not material to the decision. That was a motion to vacate an injunction order made *ex parte*, and not on notice. The clause in the order requiring the defendant to show cause, as provided by rule 94, was not acted upon, the parties not having appeared under it. The motion was therefore properly disposed of, on the ground that the *ad interim* injunction order, not having been continued, had ceased to operate. That is, I think, the real point of the decision (*Op. of LEARNED, J., 149 to 152*), and in it, I fully concur.

I am of opinion that the special county judge had power to make the order now sought to be vacated.

The defendants counsel contends further, that the order should be set aside, because, on the merits, the plaintiff is not entitled to an injunction. I am of opinion that point also is not well taken, but I do not intend to decide it, as I

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think a motion to set aside the order on that ground cannot be entertained here. The present motion is made upon precisely the same facts as those upon which the special county judge made the order continuing the injunction. In such circumstances a justice of this court cannot, in or out of court, set aside an order made on notice by a judge having jurisdiction co-ordinate with his own (*Follett agt. Weeds*, 3 *How.*, 360). The remedy is by appeal to the general term (*Code*, §§344, 349). In the Middletown case, the order having been made out of court, *ex parte*, the special term properly entertained a motion, on notice, to vacate it (*Code*, §§225, 324). The present motion might be heard if the facts presented were materially different from those which the county judge had before him, but that not being the case, the motion is dismissed, with costs. This, however, is without prejudice to the defendant's right of appeal.

NOTE.—Justices E. D. SMITH and DWIGHT are understood to concur in that portion of the foregoing opinion which relates to the power of county justices to grant injunction orders, or to continue them, on the return of an order to show cause.

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COURT OF APPEALS.

HENRY W. HART *et al*, appellants, agt. GEORGE HOFFMAN,
respondent.

Where a *broker*, employed to sell real estate, procures a party willing to purchase on the owner's terms, and the owner refuses to convey to the party so procured, the law will *presume* in the absence of evidence to the contrary, that the person so procured was *solvent* and pecuniarily able to perform the contract he offered to make. Solvency, not insolvency, is presumed in the absence of proof on the subject.

Submitted and decided October, 1870.

THE plaintiffs sued, in the New York court of common pleas, to recover brokerage for procuring one Moses as a purchaser for a stable belonging to the defendant, situate in the city of New York. Moses, a person procured by the broker, offered to purchase on the owner's terms, and the owner, on being informed of the fact, refused to convey on the ground that a month had elapsed since the broker's employment to sell, and that the owner had advanced his price and had forgotten to inform the broker of it. The plaintiffs, thereupon, brought suit.

The answer was substantially a general denial; and on the trial evidence was given proving the broker's employment, the procuring of Moses as a purchaser on the owner's terms, and the defendants refusal to convey, and the amount of brokerage due.

Whereupon the plaintiffs rested their case, and the defendant's counsel moved to dismiss the plaintiffs' complaint on two grounds.

First. That there was no contract in writing ever made between the owner and the proposed purchaser; and

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Second. That the plaintiffs had proved no cause of action. The court, thereupon, dismissed the complaint on the second ground, assigning as a reason that the plaintiffs had failed to show that Moses, the purchaser procured, was pecuniarily able as well as willing to perform the contract he offered to make; and the general term of the common pleas, on appeal, affirmed the judgment, whereupon the plaintiffs appealed to the court of appeals.

DAVID McADAM, *for appellants.*

A. H. REAVEY, *for respondent.*

By the court, PECKHAM, J.—From the papers it is difficult to discover the precise ground upon which the court, at the trial, dismissed this complaint.

When the plaintiffs rested their case the defendant moved to dismiss: because first, there was no contract in writing between the contracting purchaser Moses and the defendant. Second, the plaintiffs had proved no cause of action.

On the second ground the court dismissed the complaint. Thus the court virtually repudiated the first ground; but upon some other defect not stated or alluded to on the trial, the complaint was dismissed. We think the court erred in this. An employment of the plaintiffs as brokers by defendant to sell a piece of his real estate at a certain price, the finding of a purchaser by the plaintiffs at the price agreed upon and notifying the defendant thereof, and of the time when and where the purchase would be completed, all appearing at the appointed time to complete the purchase, and while waiting for the defendant a letter is then received from him declining to sell at the price authorized and agreed upon, and advancing \$2,000 upon the previous price. For this reason the sale fell through. So far as the case discloses, the whole cause of the failure to consummate the sale was the refusal of the defendant to fulfill the contract he had authorized to be made.

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The defendant's counsel now insists that the testimony at the trial showed that the purchaser whom the plaintiff's found, was insolvent and unable to fulfill the contract, if one had been made, and that upon that ground the complaint was dismissed. No such point was taken on the trial, nor was there any such proof. The proposed purchaser was at the appointed place, ready, as he said, to carry out the purchase, ready with the money, as he said, to make the payment agreed upon, when the refusal from the defendant was received. Obviously the solvency or the insolvency of the proposed purchaser had nothing to do with preventing the sale. The undisputed testimony at the trial was that the defendant never disputed the right of the plaintiff's to brokerage. He always conceded it.

The testimony was abundantly sufficient, not only to authorize, but to require a recovery. Besides, as the case stood, the solvency of the proposed purchaser was *prima facie* established. Solvency, not insolvency, is presumed in the absence of proof on the subject, as a promissory note is presumed to be collectable in the absence of proof to the contrary (*Ingalls* agt. *Lord*, 1 *Cow.*, 240; *Potter* agt. *The Merchant's Bank of Albany*, 28 *N.Y.*, 641).

The judgment is reversed, and new trial ordered, costs to abide the event.

All the judges concurring.

In the matter of Vogt.

N. Y. SUPERIOR COURT.

In the matter of CARL VOGT a petitioner for a discharge under a writ of habeas corpus from a warrant of the governor surrendering him to the Belgian government.

The law of this State passed in 1822, providing that the governor may in his discretion, deliver over to justice any person found within the State who shall be charged with having committed *without the jurisdiction of the United States*, any crime except treason, which by the laws of this State, if committed therein, is punishable by death or by imprisonment in the state's prison, is *unconstitutional and void*

The petitioner, it appeared was in custody under a warrant issued by the governor of this State, at the request of the Belgian minister committing him, for surrender to the authorities of that government, as a person charged with having committed murder, arson and robbery in Belgium. It also appeared that he was held under a commitment to answer an indictment for grand larceny.

No provision by *treaty* for the extradition of persons charged with crimes, exists between the United States and Belgium.

Held, that the warrant for the surrender of the petitioner to the Belgium authorities is unconstitutional and void, and insufficient for his detention.

But the commitment upon the indictment for grand larceny, being under a statute of the State, for bringing stolen goods into this State, his discharge was refused.

HABEAS CORPUS.

Before WILLIAM E. CURTIS, Justice.

By the return to a writ of habeas corpus issued, upon the petition of one Carl Vogt to the warden of the city prison, it appears that he is in custody under a warrant issued by the governor of the State of New York, at the request of the Belgian minister, committing him for surrender to the authorities of that government as a person charged with having committed murder, arson and robbery in Belgium. It also appears that he is held under a commitment to answer an indictment for grand larceny. No provision by treaty for the extradition of persons charged with crimes, exists between

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the United States and Belgium. The questions arising as to the legal effect of the warrant of the governor, were the only ones presented to the consideration of the court.

JOHN H. ANTHON, *for the prisoner.*

A. S. SULLIVAN *and* F. R. COUDERT, *opposed.*

WM. E. CURTIS, *J.*—The State law enacted in 1822, provides that the governor may in his discretion, deliver over to justice any person found within the state, who shall be charged with having committed, *without the jurisdiction of the United States*, any crime except treason, which by the laws of this state, if committed therein, is punishable by death or by imprisonment in the state's prison. (1 R. S. 164). It is claimed on behalf of the prisoner, that the power attempted to be conferred by this provision of the state law on the governor conflicts with the constitution of the United States, and is without force and effect.

The constitution of the United States provides that "no state shall enter into any treaty, alliance or confederation"; also that no state shall without the consent of congress, enter into any agreement or contract with another state, or with a foreign power.

These constitutional provisions have been regarded as of such force, that during the half century that has elapsed since the passage of the state law, I am not aware that a governor of this state has surrendered under its provisions, any person to a foreign government. It has been considered that the national government had exclusive jurisdiction over the subject, and that the act of the legislature was unconstitutional and void. It may well be doubted whether the framers of the national constitution intended that a citizen, or a person casually domiciled in a state, when charged with a crime in a foreign country, should be liable without a hearing before a judicial officer, to be surrendered at the discretion of one man to any power, European or Asiatic, as a

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criminal for judgment or punishment. It could hardly have been so left, intentionally, that a citizen on such a charge, could be placed without the protection of our courts and judicial officers, and surrendered to the authorities of a foreign country at the will of the governor of a state.

The eminent chancellor KENT, and who, the learned counsel for the Belgian government frankly avows, is the only authority he has been able to find bearing directly on the statute, following the views of Grotius, Vattel and other distinguished public jurists, as to what comity between states and nations requires, fully sustains the justice, wisdom and constitutionality of the statute. (*Kent's Com.*, vol. 1, 37, 38 and note.) But our ancestors centuries ago, strangers to the refinements of the civil law, sturdily wrung from the crown, the provision in the great charter "that no freeman shall be imprisoned, unless by the judgment of his peers, or by the law of the land." This provision is still guaranteed to us by the national and state constitutions. In the light of these events, and in a freer atmosphere, the common law jurists in distinction from those of the civil law, have treated the right of personal liberty as a right to be most sacredly guarded. It should be jealously watched and never encroached upon by either nation or state.

The constitution of the United States regarded the substance of things and not forms, and it is difficult to find in that brief instrument a superfluous word, or one without a distinct meaning. When it declares that no state shall without the consent of congress enter into agreement or compact with a foreign power, it prohibits any arrangement by which at the request of a foreign power, a state can deliver up a person charged with a crime to such foreign power. The request of the minister, is the request of the foreign power he represents, and the acceding to it on the part of the state, acting through its agent the governor, constitutes an agreement between the state and the foreign power, precisely such as the constitution of the United States prohibits by

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the use of the words "agreement or compact" thereby meaning any arrangement between the two not embraced by the terms "treaty, alliance or confederation" previously therein forbidden.

The existence of such a power by a state is also inconsistent, and at variance with the powers conferred on the federal government. It would prejudice the treaty making power and the power to entertain diplomatic relations solely conferred upon the latter. There could be no useful concurrent exercise of these powers, but on the contrary when the individual states entertain the requests and enter into arrangements with the ministers of foreign powers, a labyrinth of confusion and disasters is opened. It was doubtless to avoid this, that all relations between the several states and foreign governments, were so carefully watched and restricted by the constitution at the very formation of the government.

While there may be times when the exercise of such a power by the various states would lead to great acts of individual oppressions, especially during periods of political commotions and changes in Europe, there would necessarily arise, growing out of them, many difficult and embarrassing questions affecting the powers conferred on the general government and its relations with foreign governments, and which the former should alone determine.

Though no judgment was given in the case of *Holmes agt. Jamison et al*, (14 *Peters R.*, 540,) these views are sustained in the opinion delivered by Chief Justice TANEY and concurred in by Judges STORY, McLEAN and WAYNE, though not by some of the other judges. This was a case where the governor of Vermont granted a warrant for the surrender of an alleged criminal to the Canadian authorities, and it appears that the judges of the supreme court of judicature of Vermont, after an examination of the opinions delivered by the judges of the supreme court of the United States, became satisfied that the power claimed to deliver up the prisoner did not exist. (12 *Vermont R.*, 636.)

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It is to be regretted that this country should be the refuge of a criminal from any nationality. Treaties with provisions for the extradition of persons charged with crime after an examination before a judicial officer, exist between the general government and many foreign states. It is difficult to conceive why such an arrangement does not exist with a government like Belgium, whose liberal legislation and enlightened administration of justice is reflected in its marked developments of material prosperity. It is true that the states may, as a part of their ordinary police powers reserved to them, remove any person guilty or charged with crimes, but it is to be observed that in this the states act simply with a view to their own protection and welfare, and totally irrespective of the foreign governments in which the crimes were committed (*N. York agt. Milne*, 11 *Peters*, 102). In this contingency the person removed may still assert before our courts any rights that have been infringed upon, but when delivered over to a foreign power he may be deprived of all redress, however wronged by the act of surrender.

I am thus led to the conclusion that the warrant for the surrender of the prisoner to the Belgian authorities is unconstitutional and void, and is of insufficient authority for his detention and imprisonment by the warden of the city prison.

But it appears that he is also imprisoned on a commitment upon an indictment for grand larceny, under a statute of the state, for bringing stolen goods into this state, concerning the regularity of which no question is raised, and I decline to order his discharge from custody thereunder.

The prisoner must be remanded into custody, to be held under the commitment.

Affirmed at general term by the court of appeals, November, 1872.

Thompson agt. Fargo.

COURT OF APPEALS.

GEORGE S. THOMPSON agt. JAMES C. FARGO, Treasurer of
the American Express Company.

To sustain an action against a *common carrier* for failing to deliver goods, the plaintiff must be the owner or have some special interest in them.

Argued April 12, 1872.

THE defendant, the American Express Company, is a common carrier. On the 11th of August, 1865, the defendant received from the United States Express Company, at Decatur in the state of Indiana, a package containing money in treasury notes to the amount of \$660 63-100, together with the papers discharging John and William White from service in the army of the United States.

The defendant, on receiving said package, gave the United States Express Company a receipt for the same. The package was addressed as follows: "By the United States Express Company, \$660 63-100, John & William White, care Capt. James K. Martin, Bunton House, Terre Haute, Indiana."

The American Express Company conveyed the package in question to the place of destination without delay; search was made for the consignees, but neither they or James K. Martin, to whose care it was addressed, could be found. The defendant immediately advertised in the public papers at Terre Haute that they had received and held the package for them, John & William White.

The contents of the package was the net proceeds of John & William White's back pay in the army of the United States, and their discharge papers from the service of the United States.

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The plaintiff is a stranger to the Whites. In July, 1865, they wrote to the plaintiff, who then resided at Springfield, in the state of Illinois, enclosing their discharge papers from the service, and requested him to collect their back pay for them at Springfield, and to send it to Captain James K. Martin, Bunton House, Indiana.

The plaintiff did collect this back pay, and received for same the money in question, and enclosed same with discharge papers which he had received from the Whites in a wrapper, addressed to them, to the care of Captain James K. Martin, Bunton House, Terre Haute, Indiana.

The plaintiff, before enclosing the treasury notes, deducted all his charges against the Whites for his services in collecting their back pay, and had no further claim against the Whites or on their papers.

The plaintiff delivered the package so addressed to the United States Express Company at Springfield, Illinois, for conveyance to the consignees as requested.

The United States Express Company at Decatur delivered the package to the American Express Company, and took the defendants' receipt as aforesaid.

The action was referred to JOHN SHERWOOD as sole referee, who reported in favor of plaintiff; the general term of supreme court affirmed the judgment entered on the referee's report, and the case was appealed to this court.

H. C. VAN VORST, *for appellant*.

ISAAC HOWARD, *opposed*.

PECKHAM, J.—To sustain an action against a common carrier for failing to deliver goods, the plaintiff must be the owner or have some special interest in them (*Kerulder agt. Ellison, decided in this court last December and not reported: Greene agt. Clark, 12 N. Y., 343*).

Prima facie, the consignee is the owner.

If this had been a sale of goods by the consignor, ordered

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by the consignee, without stating in what way or any manner to send them, but only where, the consignee would have had sufficient title to maintain the action, because the title in such case, as a general rule, would not pass by the mere delivery to the carrier. In this case, however, the plaintiff never owned the money ordered to be sent to the consignees, hence, if he simply fulfilled the orders of the owners and sent the money to the consignee by a suitable and proper conveyance, his duties and liabilities were discharged. He then had no further right or interest in the matter.

The action was brought and tried upon the assumption that the plaintiff properly collected and sent the money due from the government to the Whites. There was no allegation or suggestion that he had not sent the money by the usual and proper mode; that he had not fulfilled the directions of the Whites; that he was not authorized by them to do precisely what he did. The referee has substantially so found as matter of fact, and there is no exception to any of his findings of fact.

It is too late here for the plaintiff to attempt to vary these findings of fact to sustain his judgment.

It is the right and interest of the defendant to see that this package is delivered to none but the true owner. A wrongful recovery against this defendant will afford it no defense as against the true owners or their representatives.

This is not a case of fictitious consignee. The Whites were alive, and in the civil war. This was their pay, and if they have died since this proceeding, that gives no right to this plaintiff to sue upon these facts.

It follows that the referee erred in finding for the plaintiff, and the judgment of the general term affirming that judgment must be set aside and a new trial granted, costs to abide event.

PECKHAM reads for reversal and new trial. Chief J. GROVER and FOLGER concur. ALLEN not sitting. RAPALLO not voting.

Oertel agt. Jacoby.

SUPREME COURT.

JOHANNES OERTEL and GEORGE T. JAMES agt. MAX JACOBY
and DAVID V. ZELLER

Where the plaintiffs voluntarily *publish pictures* to the public, for which they claim the proprietary right, the published copies furnish the defendants the means of reproducing the pictures without any invasion of the plaintiffs' proprietary rights therein.

Special Term, December, 1872.

THE complaint and affidavits show : 1st. Oertel, author of the paintings "Rock of Ages" and "Christian Charity;" 2d. An exclusive right communicated by him to James to multiply copies of the paintings, and sell them on joint account; 3d. The reproduction and publication by James, pursuant to contract with Oertel, of chromo-lithograph and photograph copies of the paintings; 4th. The subsequent publication and sale by defendants, without plaintiffs' consent, of chromo-lithographs of the paintings; but whether defendants copied from the original pictures, or from plaintiffs' reproductions, is not distinguished by the papers.

An interim injunction restrained the publication or sale by defendants of any reproductions, copies or imitations, in any form or style, of plaintiffs' paintings, chromos or photographs; and the motion is to dissolve the injunction for want of equity in the complaint.

ROGER A. PRYOR *for defendants.*

I. The complaint must exhibit an equity to ultimate relief by injunction (*Code of Procedure*, §219).

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An interim injunction will not issue, except plaintiffs' right be clear. If the right be questionable, injunctive relief will be withheld until the final hearing (*Amoskeag Co. agt. Spear*, 2 *Sandf.*, 599; *Sweet agt. City of Troy*, 62 *Barb.*, 634; *Redfield agt. Middleton*, 7 *Bosw.*, 649; *Gilliver agt. Snaggs*, 2 *Eq. Cas.*, *Abr.* 522; *Spottiswood agt. Clark*, 2 *Phillips' Ch.* 154; *Ld. MANSFIELD in Millar agt. Taylor*, 4 *Burr.*, 2,308; *Southey agt. Sherwood* 2 *Meri.*, 435.)

II. Here plaintiffs' right is more than doubtful; it is obvious on the face of their papers, that their claim of copyright is a frivolous pretence.

III. Copyright is the exclusive right to make and multiply copies of a composition (4 *Burr.*, 2,303), and is of two species, viz., common-law copyright, or copyright *before* publication, and statutory copyright, or copyright *after* publication (*Palmer agt. De Witt*, 47 *N. Y.*, 532; 1 *Bell's Comm.*, 116, 119; *Copinger on Copyright*, 1, note; *Shortt on the Law of Literature and Art.*, 2; *Curtis on Copyright*, 83; *Wheaton agt. Peters*, 8 *Peters*, 591; *Boucicault agt. Fox*, 5 *Bl. C. C.*, 97).

IV. Copyright after publication exists by statute (*Palmer agt. Dewitt*, 47 *N. Y.*, 536; *POLLOCK, C. B., and PARK, B., in Jeffries agt. Boosey*, 4 *House of Lords Cases*, 920, 935; *Donaldson agt. Beckett*, 4 *Burr.*, 2,408; 2 *B., P. C.*, 129; *Shortt on the Law of Literature*, 65).

Being the creature of positive institution, statutory copyright is recognized and protected only by the municipal law by virtue of which it exists (*Curtis on Copyright*, 22; *Copinger*, 77; *Shortt*, 65; *Jeffreys agt. Boosey, supra*; *Story on Conflict of Laws*, §§7-18, 375, 425, 436).

No statutory copyright is here alleged; and if asserted, this court has no jurisdiction to enjoin its infringement (*Dudley agt. Mayhew*, 3 *N. Y.*, 9).

V. Copyright *before publication* exists independently of positive law, is a right of universal recognition and remediable in all courts, and is controlled by the principles that de-

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termine the title, nature and incidents of ordinary property (*Palmer agt. De Witt, supra*; *Woolsey agt. Judd*, 4 *Duer*, 380; *Shortt*, 1 *et seq.*; *Copinger*, 1; *Donaldson agt. Beckett, supra*; *Jeffreys agt. Boosey, supra*; *Millar agt. Taylor*, 4 *Burr.*, 2,303; *Prince Albert agt. Strange*, 13 *Jurist. Part* 1, 112; *Wheaton agt. Peters*, 8 *Peters*, 591; *Bartlett agt. Crittenden*, 4 *McLean*, 300; *Southey agt. Sherwood*, 2 *Meri.*, 435; *Percival agt. Phipps*, 2 *V & B.*, 19; *Gee agt. Pritchard*, 2 *Swans.*, 403 (*marg. pag.*); *Crowe agt. Aiken*, 4 *Am. Law Rev.*, 450; *Macklin agt. Richardson, Amb.*, 695). Although Atticus freely distributed copies of Cicero's Letters (*Corn. Nep. in Vit. Attici*), it appears from an allusion by Juvenal, (Sat. VII., 87), that a property right in manuscript was recognized among the Romans; but before the art of printing, the civil law knew nothing of literary property (*Vinnii Inst. Lib.*, II., Tit. 1, s. 33., *de Scriptura*).

The common law, after some hesitation, applied its principles to the protection of the products of the mind, as well as of mechanical labor (*Millar agt. Taylor*; *Donaldson agt. Beckett*; *Wheaton agt. Peters*; *Bartlett agt. Crittenden, supra*).

VI. "In the sense in which copyright is commonly understood it comprehends, first, the right belonging to the author *before publication*, that is, the right to publish or not, as he thinks fit, and to restrain others from publishing; and, secondly, the right, *after publication*, of republishing and of restraining others from doing so" (PARKE, B., 4 *H. of L. Cases*, 954; Lord St. LEONARD'S, *id.* 979). Copyright before publication is the right subsisting in the author or artist to the first publication of his work (*Palmer agt. De Witt*, 47 *N. Y.*, 536).

Common law copyright *ends* on publication. (*Lds. BROUGHAM and ST. LEONARD'S*, in 4 *H. of L.*, *Cases* 961, 977, and *authorities supra*). Statutory copyright *begins* with publication (*Jeffreys agt. Boosey, supra*).

VII. A publication of the work, whether book or picture,

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with the author's or artist's assent, is an abandonment of his common law copyright. The work then becomes *publici juris*, and is open to any occupant. After publication with the author's or artist's consent, all may copy and reproduce (*Palmer* agt. *De Witt*, 47 N. Y., 532; *Crowe* agt. *Aiken*, 4 Am. L. Rev., 450; *Keene* agt. *Wheatley*, 9 Am. L. Reg., 33; *Boucicault* agt. *Fox*, 5 Bl. C. C., 98; *Bartlett* agt. *Crittenden*, 4 McLean, 301; *Keene* agt. *Kimball*, 13 Monthly Law Reporter, N. S., 669; *Donaldson* agt. *Beckett*, 4 Burr., 2,408; 2 B. P. C., 129; *Southey* agt. *Sherwood*, 2 Meri., 435; *Cox* agt. *Cox*, 11 Hare, 118; *Jeffreys* agt. *Boosey*, 4 H. of L. C., 815; *Chappell* agt. *Purdy*, 14 Mee. & W., 303, 319, 322; *Prince Albert* agt. *Strange*, 13 Jurist, 112; 18 part 1, L. J., N. S., 120 Ch.; *Clementie* agt. *Walker*, 2 B. & C., 861; *Page* agt. *Townsend*, 5 Simonds, 395; *Guischard* agt. *Mori*, 9 L. J., 227 Ch.; *White* agt. *Geroch*, 2 B. & Ald., 298; *Duke of Queensberry* agt. *Shebbere*, 2 Eden, 329; *Cambridge University* agt. *Bryer*, 16 East., 317; *Curtis on Copyright*, 63; *Shortt*, 48, 54). "By the act of publication the work is in the hands of the world" (1 *Bell's Comm.*, 119).

The principle prevails in the law of patents. If the inventor allow his machine to be used by the public, he abandons his right (*Gaylor* agt. *Wilder*, 10 How. U. S., 477; *Shaw* agt. *Cooper*, 7 Peters, 292).

VIII. If common law copyright survive publication, then was there never occasion for any statutory protection. It is only because the author's natural right expires with publication, that legislation is necessary to give him an artificial privilege.

It is matter of history that the English act for the copyright of prints originated with Hogarth, who found no protection in the common law against the indiscriminate reproduction of his works (1 *Bell's Comm.*, 123).

IX. What constitutes a publication effectual to forfeit the author's or artist's common law copyright is settled as well

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affirmately as negatively. Thus the performance of a play (*Macklin* agt. *Richardson*, *Ambler*, 695; *Palmer* agt. *De Witt*, *supra*), the exhibition of a picture under restrictions, (*Turner* agt. *Robinson*, 10 *Irish Ch. R.*, 121) the oral delivery of lectures (*Abernethy* agt. *Hutcheson*, 3 *L. J.*, 209 *Ch*), the sending private letters to a correspondent (*Wolsey* agt. *Judd*, *supra*), the engraving a picture for private use and gratuitous distribution among select friends (*Prince Albert* agt. *Strange*, *snpra*), the entrusting a manuscript for a special purpose (*Queensberry* agt. *Shebbere*, *supra*)—none of these acts is equivalent to a publication.

On the other hand, that the copying a picture, and exposing the copies for general and indiscriminate sale, with the assent of the artist, is such a publication as makes the right to copy the original, *publici juris*, is conceded by all authorities and questioned by none (*Palmer* agt. *De Witt*, *supra*; *Crowe* agt. *Aiken*, *supra*; *Keene* agt. *Wheatley*, *supra*; *Prince Albert* agt. *Strange*, *supra*; *Jeffreys* agt. *Boosey*, *supra*; *Curtis*, 83, *et seq.*; *Shortt*, 48 *et seq.*; *Copinger*, 9, 59, and other authorities, *supra*).

X. Photography and lithography being essentially different from oil painting, it may be argued that the publication of James's copies was no publication of the original pictures. But the thing in which an artist has copyright, is the conception and developement of his ideas; and these it is the boast of photography and lithography exactly to reproduce. A picture is analagous to a manuscript; and an engraving is the same as a book. A lithographic copy more resembles the original painting in every physical circumstance, than does a book the author's manuscript. But if James' copies be not a publication, because not a reproduction of the original pictures, then neither are defendants' copies a reproduction of the original paintings, and so, are not an infringement of Oertel's rights.

XI. By communicating to James the right to multiply and vend an indefinite number of copies of his paintings,

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and by assenting to the copying and sale, Oertel abandoned his common law right, and defendants were authorized to make and sell copies of the originals; and, by publishing his lithographs without the protection of a statutory copyright, James dedicated them to the public, and every one is at liberty to reproduce them.

XII. Oertel had no exclusive right to republish after publication, and he could communicate none to James.

XIII. Even if defendants had no right to copy from the originals, this injunction cannot stand; because it is not apparent but that defendants reproduced from James' lithographs; and *that* they had an indisputable right to do. The law construes an equivocal act in a legal sense.

Moreover, copying from the originals, if wrongful, would be a violation of Oertel's exclusive right, and would give no cause of action to James.

XIV. If defendants had copied from the originals, and in doing so had invaded Oertel's premises, or violated any trust, or had infringed his possessory or proprietary right in the physical substance of his pictures, then he might have had redress by the appropriate form of remedy. But nothing of the sort is here pretended. The injunction must stand or fall upon the case presented by the papers, and that case is simply an alleged infringement of plaintiffs' common law copyright.

XV. *Maxwell*, agt. *Mayhew* (1 *Johns. and Hemming*, 313) does not touch the question here either in the adjudication or argument.

The right there involved was a right under the British statute of copyright, and the decision turned exclusively on the construction of that statute.

In *Cox* agt. *The Land and Water Journal* (*Law Rep.*, 9 *Eq. Cases*, 324,) Vice-Chancellor MALINS propounds the doctrine for which plaintiffs contend; but it was a mere *dictum*, unsupported by any citation of authority, and notori-

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ously contrary to the well-settled law of this country. Moreover, an injunction was there denied.

Counsel for plaintiff, in *Turner* agt. *Robinson* (10 *Irish Ch.* 121), conceded the principle on which we stand, viz., that a publication is an abandonment of the artist's right, and the master of the rolls assumed it as an indisputable proposition. The decision proceeded on the assumption that an "imperfect" woodcut, inserted in a magazine, was no publication of the original painting—an essentially different case from ours—and on the ground of a breach of trust by defendant in copying contrary to implied restrictions attached to the privilege of seeing the painting. No such misconduct is imputed to us,

Oertel agt. *Wood* (40 *How.*, 10) is of no authority (*Palmer* agt. *De Witt*, 47 *N. Y.*, 532).

XVI. Plaintiffs may possibly heed the hint suggested by the editor in his criticism on *Crowe* agt. *Aitken* (4 *Am. L. Rev.*), and may assert a trade-mark right in James's copies. The claim is invalid, because, first, no trade-mark right in plaintiffs is alleged or exhibited by the papers; secondly, the relief prayed is not to restrain the use of a trade-mark in the sale of defendants' chromos, but to enjoin the reproduction or sale of plaintiffs' pictures in any style or form of imitation; thirdly, the injunction granted does not purport to inhibit the use of plaintiffs' trade-mark in connection with defendants' chromos, but assumes to restrain any reproduction or imitation of plaintiffs' pictures with or without the pretended trade-mark; fourthly, if there be a trade-mark right in plaintiff, it is infringed by defendants in the sale of only one of their chromos, since to only one of the chromos have they applied the descriptive appellation employed by plaintiffs. But, fifthly, and conclusively, the pretended trade-mark does not indicate origin or ownership, but is merely a printed representation of the idea embodied in the picture; and so, is not the subject of trade-mark property (*Canal Co.* agt. *Clarke*, 13 *Wall.*, *U. S.*, 322, 323; *Amoskeeg Co.* agt.

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Spear, 2 *Sandf.*, 608, *et seq* ; *Thompson* agt. *Winchester*, 19 *Pick.*, 214 ; *Filley* agt. *Fassett*, 44 *Mo.*, 173 ; *Candee* agt. *Deere*, 54 *Ill.*, 439 ; *Ferguson* agt. *The Doval Mills*, 2 *Brewster*, 314 ; *Corwin* agt. *Daly*, 7 *Bosw.*, 222 ; *Fetridge* agt. *Wells*, 4 *Abb.*, 144 ; *Stokes* agt. *Landgraff*, 17 *Barb.*, 608 ; *Town* agt. *Stetson*, 5 *Abb.*, *N. S.*, 218 ; *Phalon* agt. *Wright*, 5 *Phil.*, 464 ; *Wolf* agt. *Garland*, 18 *How.*, 64 ; *Choy-niski* agt. *Cohen*, 39 *Califor.*, 501).

XVII. If any trade-mark be asserted it must consist of the words "Rock of Ages," inscribed upon the picture and copies. These words constitute part of the title of a hymn, which is found in all the collections of every denomination of the protestant community, and which is a familiar household strain among every sect of christians.

This sacred song was written by Thomas Montague Toplady, and was published in the *Gospel Magazine* of March, 1776, (page 131,) with the title of "A living and dying prayer for the holiest believer in the world"; but as the hymn grew popular, the first, which is also the penultimate line was substituted as a shorter and more significant name. A Latin version by the right honorable Wm. E. Gladstone, beginning "*Jesus pro me perforatus*," was printed by Quaritch in 1861. The idea of the hymn, "Christ the rock of salvation," pervades the sacred scriptures, and the identical expression "Rock of Ages" is in the original Hebrew text, rendered in our version, "Everlasting strength"—(*Isaiah*, 26, 4). Oertel's painting, and the copies both of plaintiffs and defendants, simply embody with varied accessories of embellishment, the sentiment of the second line in the third verse of Toplady's hymn, "Simply to thy cross I cling." The title of the painting is borrowed from the hymn, and is merely expressive of the subject and indicative of the idea. Clearly it is not susceptible of a trade-mark property.

XVIII. Plaintiffs claim a monopoly, which the law will not tolerate. They assert an exclusive right to multiply and distribute reproductions of their pictures. If such right

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exist it is transferable and descendible as other personalty, and must subsist in perpetuity in exclusion of the public. It is a right above and beyond that created and protected by the copyright law. The interests of civilization require the utmost diffusion of the products of the intellect. Humanity is concerned in whatever consolation art may draw from the inspirations of scripture or poetry.

Repudiating the pretension here urged by plaintiffs, Napoleon I. said, *Le progres des lumieres serait arrete &c.*, (Locre, *Legislation civile de la France*, tit. 9, pp. 17, 19). The interest of the individual author is not the ultimate object of the copyright laws, but is an expedient rather for the public welfare. The operation of these laws is to secure the author an exclusive use for a limited period, that he may be stimulated to the production of works for the benefit of mankind. (Routledge agt. Low, 37 part. 1, L. J., 454, Ch. per Lord CAIRNS; Curtis on copyright, 19). The first copyright law—of Anne—was entitled “An act for the encouragement of learning”; the second—of George III.—“An act for the further encouragement of learning.” (U. S. Constitution, § 8, Art. 1).

To recognize plaintiff's claim would be to obstruct the progress of letters and to restrict the benign influences of art.

XIX. The injunction should be vacated.

CLARENCE A. SEWARD, *for plaintiffs*,

Used the same points for plaintiffs contained in this case in 40 How., Pr. R., p. 10.

LEONARD, J.—It appears from the complaint that there has been a publication by the plaintiffs of the pictures mentioned in the injunction.

The defendants cannot be charged with having surreptitiously obtained copies of the originals. The published copies furnished the defendants with the means of re-pro-

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ducing the pictures without any invasion of the proprietary rights of Mr. Oertel.

The defendants have not anticipated the publication by plaintiffs. They have the right to re-produce the pictures that have been voluntarily given to the public.

I think the private rights of the plaintiffs are no longer entitled to protection according to the adjudicated case. (*Palmer agt. De Witt*, 47 N. Y., 532).

Injunction dissolved ; costs to abide the event, \$10.

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SUPREME COURT.

HIRAM P. TRIM and others agt. SAMUEL A. WILLOUGHBY.

The act of March 27th, 1871, providing for the extension of *mechanic's liens, &c.* being remedial, was passed for the purpose of extending the time for the enforcing the lien when proceedings were commenced within the year; and where the lien existed at the time the statute took effect, *held*, that the act applied to such proceeding.

THIS is a proceeding under the statute to enforce or foreclose a lien, under the following acts of the legislature, to wit, *mechanic's lien*: Act passed April 17th, 1854, applying to certain counties in this state. Act of April 14th, 1858, making the above mentioned act apply to all the counties of the state, except the counties of New York and Erie. By the provisions of the above mentioned acts, the lien continued for one year, from the time of the filing; and unless judgment was recovered (on proceedings to foreclose the lien) within one year from the time of filing, the lien could not be enforced (*Grant agt. Vandercook, 57 Barb., 165*). By an act of the legislature, passed March 27th, 1871, the above mentioned act was amended, and the amendment reads as follows: "Section 20 of chapter 402 of the laws of 1854, is hereby amended, so as to read as follows: Every lien created under the provisions of this act, shall continue until the expiration of one year, unless sooner discharged by the court or some legal act of the claimant in the proceedings; but if within such year proceedings are commenced under this act to enforce, or foreclose, such lien, then such lien shall continue until judgment is rendered thereon, and for one year thereafter;" and the act, by its provisions, took effect immediately.

In this case the lien was filed (by the plaintiff or claimant, who furnished materials to the contractor) on or about the 20th day of January, 1871.

The action to enforce or foreclose this lien, was commenced

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about the last of January, 1871, nearly two months before the passage of this amendatory act. Issue was joined in the proceeding, and the matter was referred to W. T. ODELL, as referee, to hear and determine. Several hearings took place, within the year after the filing of the lien, and the action was adjourned from time to time by the consent of the parties until the 28th day of October, 1872, when a motion was made by the counsel for the defendant, to dismiss the action and the complaint therein, on the ground that more than one year had elapsed since the filing of the lien in this case, and since the action or proceeding to enforce the same was commenced; that the lien had expired, and no legal judgment could be rendered or entered therein.

A. POND, *for the motion,*

Cited, 57 *Barb.*, 165; 40 *How.*, 94; 47 *N. Y.*, 566; 7 *Johns.*, 477; 1 *Hill*, 325; 2 *Hill*, 283; 5 *Denio*, 183; 11 *Paige*, 403; 47 *Barb.*, 177; 24 *N. Y.*, 20; 15 *N. Y.*, 595.

J. R. PUTNAM, *for plaintiff,*

Cited, 57 *Barb.*, 165; 3 *Lans.*, 134; 3 *Cow.*, 308; 45 *Barb.*, 218; 5 *Lans.*, 173; 11 *N. Y.*, 281; 9 *Barb.*, 482; 4 *Kern*, 22; 19 *N. Y.*, 68; 8 *How.*, 207; 1 *Cow.*, 536; 4 *Wend.*, 210; 3 *Kern*, 313; 47 *N. Y.*, 163; 17 *How.*, 459; 2 *Seld.*, 463; 15 *N. Y.*, 596; 11 *Paige*, 400; 2 *Com.*, 182.

W. T. ODELL, *referee*.—The only question that arises on this motion, is, does the statute of March 27, 1871, apply to a proceeding, then commenced, to enforce or foreclose a lien then in existence? This lien would have continued (had no proceedings been commenced upon it) for about ten months after the act of March 27, 1871, went into effect. The act does not expressly provide that it shall apply to liens already created, or proceedings then commenced. It is,

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therefore, a question of construction (*Bay agt. Gae*, 36 *Barb.*, 449).

“And it is the duty of courts so to construe the statute as to meet the mischief, and advance the remedy” (*Hart agt. Cleis*, 8 *Johns.*, 41).

“The intention of the legislature is to be gathered from other acts, *pari materia* as well as from the act itself. Sometimes it is to be collected from the cause or necessity of the statute” (*People agt. Utica Insurance Co.*, 15 *Johns.*, 358; *Kent's Com.*, 462; *Dresser agt. Brooks*, 3 *Barb.*, 429).

The lien in this case was created by proceedings under a former statute, and the act of 1871 merely affected the remedy. Under the former statute, judgment must be recovered within the year from the time of filing the lien. The party proceeded against, or the owner of the property against which proceedings were taken, could defend, make issue, and these issues, were to be tried like issues in actions at law. And for various reasons—sickness or absence of witnesses, &c., the proceedings could be extended beyond the year and the lien cease. The former statute was evidently defective, and in many instances would afford no remedy to the mechanic or furnisher of material. It is evident that the statute of March 27, 1871, was passed to cure this defect, and being remedial, should receive a liberal construction (3 *Barb.*, 429; 16 *Johns.*, 264; 10 *Barb.*, 35; 10 *Wend.*, 449.)

In *Grant agt. Vandercook*, (57 *Barb.*,) Justice HOGBOOM, at page 167, uses the following language: “The remedies created in the mechanic's lien law are of a purely statutory and extraordinary nature, and the provisions for their enforcement must be strictly construed” (Citing, *Roberts agt. Fowler*, 3 *E. D. Smith*, 632). This, I think, must mean that the statute, so far as it provides for proceedings to create or perfect the lien, must be strictly construed. But when the lien is once created or perfected under the statute, then the remedial part of the statute so far as the provisions for foreclosing the lien, is subject to a different rule of construction, “A

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statute may be regarded as penal, and to be strictly construed in one aspect, but as remedial and to be liberally expounded in another aspect" (*Fish* agt. *Fisher*, 2 *Johns. cases*, 89). "When scanning the proceedings to attain a remedy, the courts have been strict and rigid in exacting a compliance with all the requisitions of the statute," if the statute is in derogation of common law. But "when looking at the remedy, the courts have taken care that it should be made effectual, if possible, in the manner intended" (20 *Johns.*, 80; *Smith* agt. *Nojett*, 1 *Barb.*, 65; 9 *Wend.*, 227; 8 *Cow.*, 13; 20 *Wend.*, 207; 9 *How.*, 238).

It is evident from the circumstances under which the statute was passed, and from the act itself, that it was the intention of the legislature to cure the defect in the former law, and afford parties who had filed liens an adequate remedy to enforce them. And this intention must prevail in its construction by the courts (1 *Kent's Com.*, 162; 15 *N. Y.*, 532; 26 *N. Y.*, 523; 31 *N. Y.*, 289).

It is not subject to the objection that it affects vested rights. It only changes the limitation of the lien. That when proceedings are commenced within the year to enforce the lien, that then the lien shall continue. This the legislature may do (1 *Hill*, 324; 1 *Story on the constitution*, 236, § 1,385).

The legislature has power to control the remedy. So held in relation to the statute increasing the amount of property exempt from execution (11 *N. Y.*, 281; 36 *Barb.*, 447) and the law in relation to costs which are to be adjusted, under the law in effect at the time of adjustment; so in regard to the law abolishing distress for rent.

The act of 1871, being remedial, passed for the purpose of extending the time for enforcing the lien when proceedings were commenced within the year, and the lien in this case existing at the time the statute took effect, it is held that the act applied to this proceeding, and the motion must be denied.

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SUPREME COURT.

LEAVITT D. GARRISON & ALLIS W. OGDEN, respondents, agt.
A. W. MARSHALL, appellant.

A justice of the peace has no jurisdiction to issue an *attachment* under the Revised Statutes (2 R. S., 230, § 26) upon affidavits and papers, unless "it shall satisfactorily appear to the justice that such debtor has departed or is about to depart from the county where he last resided, with intent to defraud his creditors, or to avoid the service of any civil process, or that such debtor keeps himself concealed with the like intent:"

Or if the application is intended to be made under § 34 of the *non-imprisonment act* of 1831, "it must satisfactorily appear before the justice that the defendant is about to remove from the county any of his property with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete any of his property with the like intent, whether such defendant be a resident of the state or not."

In this case, the application for the attachment was made upon the grounds that "the said George Woodruff has departed, and is about to remove his property from the said county of Cayuga with the intent to defraud his creditors."

Held, that the portion of the application stating that the defendant in the attachment had departed, &c., would bring the case under § 26 of the Revised Statutes; while the latter clause presents a case under § 34 of the non-imprisonment act.

As the application for the attachment was partially made under § 26, it should have been made to appear by the affidavits that the defendant had departed "from the county where he last resided." So also, as it sought to make out a case within the provision of § 34 of the non-imprisonment act, the papers should have shown either that the defendant was a resident of the state, or a non-resident.

These facts were essential to give the justice jurisdiction to issue the attachment, and without one or the other of them, no case was made out within either section of the several statutes quoted.

Binghamton, General Term, September, 1871.

MILLER, P. J., PARKER and JAMES, JJ.

THE action is against the defendant, as a constable, for an alleged neglect to serve an attachment issued by a justice, against the property of one George C. Woodruff, a debtor to the plaintiffs, and was tried before a justice of the peace, of Cortland County.

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The evidence tended to show that the attachment was delivered to the defendant about the sixth of October, 1869, and that it was not returned to the justice; and the reason alleged why it was not served or returned, is, that it was issued without authority, and therefore void.

It was received in evidence under objection, and at the close of the plaintiff's testimony a motion was made for a nonsuit, which was again renewed after all the evidence was in, upon the ground that the plaintiff had failed to make out a cause of action, and that there was no legal evidence showing any authority to issue the attachment, which motion was denied by the justice.

The application for the attachment was based upon two distinct grounds. One for an alleged departure with intent to defraud creditors, under the Revised Statutes, and another for an alleged design on the part of the debtor to remove his property with like intent, under the non-imprisonment act of 1831. The affidavits were as follows, see Exhibits C, D, E, F, on page 20, 21, 22, 23. The bond given on the application was executed by one person only, and in the penalty of only \$100.

A judgment was rendered against the constable before the justice for the demand, and on appeal was affirmed in the county court.

The defendant appealed to the general term of the supreme court. The case was submitted on printed points.

W. H. WARREN and H. BALLARD, *for appellant and defendant.*

DUELL & FOSTER, *for respondents and plaintiffs.*

By the court, MILLER, P. J.—This action is brought against the defendant, as a constable, for neglecting to levy upon personal property, by virtue of an attachment against one Woodruff.

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The defense interposed is, that the attachment was issued without authority, and was, therefore, void and of no effect.

It is urged that the justice did not acquire jurisdiction to issue the attachment, because it nowhere appears either in the application, or in the affidavits, in what county the debtor resided, nor is there any allegation that he has departed, or is about to depart, from the county "where he last resided," as provided by the statute (2 R. S., 230, § 20), provided that an attachment against the property of any debtor may be issued "whenever it shall satisfactorily appear to the justice that such debtor has departed, or is about to depart from the *county where he last resided*, with intent to defraud his creditors, or to avoid the service of any civil process; or that such debtor keeps himself concealed with the like intent." Additional cases were provided for by the non-imprisonment act, and it was enacted that actions might also be commenced by attachment, "when it shall satisfactorily be made to appear, that the defendant is about to remove *from the county* any of his property with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete any of his property with the like intent, whether such defendant be a resident of this state or not" (*S. L. of 1831, chap. 300, § 34, as amended by S. L. of 1842, ch. 107; 3 R. S., 5 ed., 462, 463, § 216*).

The application for the attachment, as appears from the affidavit of the plaintiff's agent, was upon the grounds, that "the said George Woodruff has departed, and is about to remove his property from the said county of Cayuga, with the intent to defraud his creditors."

The portion of the application stating that the defendant in the attachment had departed, &c., would bring the case under sec. 26 of the Revised Statutes; while the latter clause presents a case under sec. 34 of the non-imprisonment act.

As the last section makes provision for other cases besides what had previously been provided for, sec. 26 remains in

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force, subject to the changes made in favor of additional cases by sec. 34.

As the application for the attachment was partially under sec. 26, it should have been made to appear by the affidavits, that the defendant had departed "from the county where he last resided."

So also, as it sought to make out a case within the provision of sec. 34 of the non-imprisonment act above cited, the papers should have shown either that the defendant was a resident of the state, or a non-resident.

These facts were essential to give the justice jurisdiction to issue the attachment, and without one or the other of them, no case was made out within either section of the several statutes quoted.

It is nowhere stated in what county the defendant last resided, so as to make out a case within sec. 26.

This is absolutely essential (*Tucker agt. Malloy*, 48 *Barb.*, 88, 89), nor is it shown whether he was a resident or non-resident, so as to answer the requirements of section 34.

When the application is made for an attachment against a non-resident, the party applying must make an affidavit of the fact of non-residence, and when no such affidavit is furnished, the judgment will be reversed (*Taylor agt. Heath*, 4 *Denio*, 592).

The affidavits utterly fail to comply with either of the statutes in question. The agent of the plaintiff swears that the defendant "had departed, or is about to remove his property from the said county of Cayuga," without previously stating that he lived there, or where he did reside, or whether he was temporarily there, or passing through Cayuga County, or that he was a non-resident.

The naming of the county is a mere reference to the county in which the affidavit is entitled, which is given at its commencement. Although the affidavits are entitled: "Cayuga County, town of Locke," they do not show in any way

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where the property was, in what town or county, from whence it was to be removed.

There is nothing in fact in either of the affidavits to show or to indicate that the property of the defendant, which it was alleged he was about to remove, may not have been in some other county or even some other state, where they could not be reached by any attachment issued by a justice of the peace of Cayuga County.

The affidavits showing conversations with the defendant's wife, and the packing up of the goods, do not state where the conversations took place, or where the goods were packed up to be removed. There is nothing, therefore, in the papers, from which it may fairly be inferred where the defendant in the attachment resided, or whether he was a resident or non-resident of the state.

There is no rule better settled in this state than that on proceedings of this character, the statute must be substantially complied with in order to confer jurisdiction.

It is unnecessary to cite authorities in support of a proposition so plain and so well understood. It is evident that the defects referred to, were of a jurisdictional character which rendered the attachment void, and that the justice acted without authority in granting it. The defendant, therefore, was not bound to serve it, and was not liable for a neglect to do so.

Several other objections are urged to the proceedings, but inasmuch as the error adverted to is fatal to the judgment, it is not important to discuss them. For this error the judgment of the justice and the county court must be reversed with the cost of appeal.

PARKER and JAMES, *JJ.*, concurred in the result.

St. John agt. Skinner.

N. Y. SUPERIOR COURT.

GEORGE S. ST. JOHN, *plaintiff and respondent*, agt. SALOMON SKINNER, *defendant and appellant*.

In an action on contract, and a general denial, at the close of the testimony on both sides, at the trial, the case presents a clear conflict as to the real agreement between the parties, and the defendant concedes such fact by omitting to move for the direction of a verdict, and by going to the jury without objection, he is too late, after verdict rendered against him, to argue that the case presented no evidence to be submitted to the jury, or, at least, presented such a preponderance of evidence in his favor as to make it the duty of the court to direct the jury how to find.

Where exceptions taken to the admission of testimony on the trial and to the judge's charge, are irrelevant, under the issues, and outside of the issues they could only become material by their tendency to establish, in connection with other facts to be introduced, the existence of a special agreement in avoidance or as a defense to the claim testified to by the plaintiff, it constitutes new matter, and not being specially pleaded, is properly excluded.

General Term, October, 1872.

Before FREEDMAN and CURTIS, JJ.

THE action was brought to recover the sum of \$3,000, loaned by plaintiff to defendant.

The answer contained a general denial. At the trial both parties introduced evidence.

The jury found for the plaintiff.

The defendant moved upon the judge's minutes for a new trial upon the ground that the verdict was against evidence.

The motion was denied.

Judgment was entered upon the verdict, and defendant appealed from the judgment and order denying motion for new trial.

A. H. REAVY, *counsel for appellant*.

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W. H. VAN COTT, *counsel for respondent.*

By the court, FREEDMAN, J.—The motion for a nonsuit was properly denied, because plaintiff, as the evidence then stood, had made out a *prima facie* case. At that stage of the trial, the plaintiff was entitled to claim that all presumptions and inferences, which he had a right to ask the jury to deduce from his testimony, should be conceded to him. Consequently, it would have been error to dismiss the complaint.

At the close of the testimony on both sides, the case presented a clear conflict as to the real agreement between the parties, and the defendant conceded such fact by omitting to move for the direction of a verdict, and by going to the jury without objection. Having voluntarily taken his chance of a favorable verdict at their hands, which would have concluded the plaintiff upon the facts, the defendant, after the rendition of a verdict against him, was too late to argue that the case presented no evidence to be submitted to the jury, or, at least, presented such a preponderance of evidence in his favor, as to make it the duty of the court to direct the jury how to find. This rule we distinctly laid down in the recent case of *Rowe agt. Stevens* (12 *Abb. N. S.*, 389), and upon the authority of that case the order appealed from must be affirmed.

The exceptions taken to the charge of the court are clearly untenable, and those taken to the disallowance of certain questions propounded to the plaintiff on his cross-examination are found, on examination, not to be sustainable. The answer contained only a general denial. Under the issues thus joined these questions were irrelevant. Outside of the issues, they could only become material by their tendency to establish, in connection with other facts to be introduced, the existence of a special agreement in avoidance of, or as a defense to the loan testified to by the plaintiff.

This constituted new matter which under sections 149 and 150 of the code should have been especially set up. Not being

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thus pleaded, the questions referred to were properly excluded (*McKyring* agt. *Bull*, 16 N. Y., 297; *Richtmeyer* agt. *Remsen*, 38 N. Y., 206; *Meyer* agt. *Fugel*, 7 Robt., 122).

Upon being apprised of this rule, the defendant might have moved for leave to amend his answer upon the spot, or for permission to apply at special term for that purpose, and if such motion had been made, the court could have relieved him against the consequences of his omission on proper terms.

But defendant did not see fit to make such motion. There being no error in the rulings of the court below, the judgment must be affirmed.

The judgment and order appealed from are severally affirmed with costs.

CURTIS, J., concurred.

The People agt. Green.

SUPREME COURT.

THE PEOPLE *ex rel.* MARK M. POMEROY agt. ANDREW H. GREEN and others constituting THE BOARD OF APPORTIONMENT AND AUDIT.

Where the *relator's newspaper* was designated and selected by the mayor and comptroller of the city of New-York, in 1868, under the laws of 1868, as one of the journals wherein the proceedings of the common council and the notices of its committees should be published; and, in 1870, other newspapers, of which the relator's was not one, were designated by the same officers under the act of that year, and it was declared by that act to be unlawful to pay any money for advertising thereafter made for or on account of the corporation, except to such newspapers (*Laws, 1870, ch 383*); and no designations were made under this act, and the power thereby conferred remained unexecuted.

Held, that a *mandamus* would lie to compel the defendants to audit and allow the bills of the relator for advertising done in 1870, after the passage of chapter 383 of the laws of that year, and solely under the authority of the designation of his newspaper in December, 1868, there never having been any notice, either express or implied of the revocation of the original appointment of his newspaper.

Special Term, June, 1872.

THIS was a motion for a writ of peremptory mandamus to compel the board of apportionment and audit to convene and proceed to audit and allow the bills of the relator for advertising and publishing notices, &c., for the corporation of the city of New-York in certain newspapers, known as *The New-York Democrat* and *Pomeroy's Democrat*. The bills of relator were duly presented for payment to the board, but the board neglected to audit and allow the same.

GEORGE NORRIS and ABRAHAM LAWRENCE, *of counsel*
for relator.

JOHN H. STRAHAN and EDWARDS PIERREPONT, *of counsel*
for the board of apportionment and audit.

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RICHARD O'GORMAN, *for the mayor, aldermen, and commonalty of the city of New-York.*

BARRETT, J.—The question presented for the consideration of the court is whether the relator has any legal claim against the city and county of New-York, which it is the duty of the board of audit to investigate and settle. The solution of this question depends upon the construction given to the second section of chapter 375 of the laws of 1872. The comptroller is thereby required to allow and pay the bills of the *several proprietors of the newspapers in said city and county for all city and county advertising actually done prior to January 1, 1872.*

It is claimed that the effect of the words italicized is to legalize all previously illegal demands, and to require the payment of the bills of mere volunteers, the same as of those publishing under legal authority. It would require the most direct and unmistakable language, language susceptible of no other or fairer meaning, to justify the court in imputing a legislative intention to perpetrate such wrong upon our people. There is nothing in the act demanding such an interpretation. Its object, so far as the newspapers are concerned, evidently was to provide an appropriate procedure, with an adequate fund for the speedy liquidation and payment of all strictly legal obligations, and also of all just and honest claims of an equitable, if not of a technically legal, character. There is the fullest intention of providing for publishers who had acted under legal authority, or, at least, in good faith under color of such authority, but none of presenting any part of the public funds to those who had acted in palpable violation of law without a shadow of authority. There are other provisions of the act favoring this construction, such as the distinct reference to the authority of the board of canvassers in connection with the publication of the official canvass, and also the direction not to “audit or allow any claim at a greater rate or amount than that *fixed by law or by a contract*

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under which any services were rendered or materials furnished."

So, too, as to the mode of procedure. The bills are to be read aloud at the time of presentation, entered by the clerk of the board in a suitable book or journal, and laid on the table for four days thereafter for objections.

"All objections" made within the four days are to be duly considered by the board. The words "all objections" are surely broad enough to cover the major as well as the minor, the legality as well as extent of claim. It is also urged that the general laws of the state in force at the time of the passage of the act, afforded adequate remedies for the enforcement of all legal claims, and that, therefore, the provisions in question are supererogatory under any other than the extreme construction contended for. This view, however, overlooks the fact that even for those whose claims are of undoubted validity, a special fund is provided with a procedure which contemplates payment within thirty days from the passage of the act. It also overlooks the equitable spirit which pervades the act, and which authorizes the board to consider the claims of those who with but doubtful legal right are yet entitled, having acted in good faith, under cover of legal authority and equitable consideration. Take, for instance, the provision respecting the publication of the official canvasses. Here all publications actually made under the authority of the board of canvassers are legalized and payment required.

Whether the board of canvassers directed such publications without any legal authority, or, having a limited authority, exceeded their powers with reference to the number of the newspapers or the extent of such publication. The innocent proprietor who published *bona fide*, relying on such authority, is protected. It will be seen that the act in question was a necessary and just supplement to existing laws, and that the construction which the court puts upon it, is in

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harmony with its purpose and spirit. It remains but to apply these views to the case of the relator.

A large part of the publication for which he claims, viz., those specified in schedules C, D, E, and F annexed to his affidavit, were made apparently without any contract, express or implied, and without any legal authority or even official request. The allowance of such claims would be pure gratuity, and the court will not by *mandamus*, a writ which only issues in cases of unquestionable legal right, direct the board even to consider them.

A part of the relator's services, however, (viz.: those specified in schedules A and B appended to his affidavit), was performed under color of legal authority. On the 1st of December, 1868, his newspaper, the *Daily Democrat*, was selected by the mayor and comptroller, under chapter 853 of the laws of that year, as one of the journals wherein the proceedings of the common council and the notices of its committees should be published. In 1869, there was no legislation on the subject. In 1870, the mayor and comptroller were authorized to designate seven daily and six weekly newspapers for such advertising purposes, and it was declared to be unlawful to pay any money for advertising thereafter made or incurred, of any description, for or on account of the corporation, except to such newspapers (*laws of 1870, chapter 383*). No designations were made under this act, and the power thereby conferred remained unexecuted. In 1871, the mayor and comptroller were authorized to designate, from time to time, nine morning or evening daily, and nine weekly newspapers, to publish such digest of the proceedings of the common council as might be prepared and authorized by this act.

All the newspapers authorized by this act were duly designated, but none of the relator's journals were selected. The advertising specified in schedules A and B was done in 1870 after the passage of chapter 383 of the laws of that year, and solely under the authority of the designation of

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December 1, 1868. If the work had been done at the designation of the nine daily and nine weekly newspapers under the act of 1871, it would have been plainly illegal, and the court could not have treated it as within even the broad language and equitable spirit of the act of 1872. But it was all done in 1870 without any notice, express or implied, of the revocation of the original appointment, and it may well be in view of the failure to designate afresh the absence of any revocation or other notice, and the necessity which existed for some corporation advertising that the proprietors of the four daily and three weekly newspapers, which had been designated under the act of 1868, thus deemed their appointments to have been continued under the act of 1870. At all events, that part of the work was beneficial and necessary so long as the power remained unexecuted and was done under color of legal authority, and if the above view is correct, it comes within the purview of the act of 1872, and is thereby directed to be audited, allowed and paid.

A mandamus must, therefore, issue requiring the board to audit the claims embraced in said schedules A and B. It will then be for the board to investigate the details, and satisfy itself that the advertisements were actually inserted and published as charged, and to audit such items as in this view of their legality may be found to be just, but at no greater rate or amount than fixed by law or by a contract under which such services were rendered. And if there be no express contract, then the board should audit upon the basis of the *quantum meruit*, viz., of an implied contract to pay what the services are reasonably worth. This is a matter within the discretion of the board, and the mandamus will only direct the principle upon which it should act, without interfering with the fullest exercise of this discretion. In all other respects the motion is denied. Let the order be settled upon one day's notice.

Jordan agt. Kent.

SUPREME COURT.

JOHN A. JORDAN agt. HIRAM KENT.

In an action against a stakeholder to recover money deposited with him as a bet or wager upon the result of a horse race, it must appear that there were two or more contracting parties having mutual or reciprocal rights to the money or things wagered.

The plaintiff in this case put into the defendant's hands, who was secretary of a driving association, \$60, as an entrance fee, to entitle him to trot his horse over the race course in competition with other horses for two purses of \$300 each. The plaintiff trotted one of said races, and was beaten, and the other race was withdrawn on account of bad weather, and the association tendered the plaintiff \$30, which he refused to receive.

In an action against the defendant to recover the \$60 thus deposited, *held*, that there was not any such contract of wager between the plaintiff and defendant as could sustain the action.

Wayne Circuit, April, 1872.

THE complaint in this action alleged that the plaintiff and defendant made a bet or wager upon the event of a horse race, and the plaintiff deposited with the defendant, as stakeholder, the sum of \$60.

The answer denied the complaint, and alleged that the defendant was the secretary of the Palmyra Driving Association. That in the summer of 1871, said association arranged and advertised certain races. That the plaintiff entered his horse in two races, and paid as entrance-money \$60, to wit, ten per cent. of two premiums of \$300 each. That he trotted one of said races, and was beaten, and the other race was withdrawn on account of bad weather, and that the association tendered the plaintiff \$30, which he refused to receive.

The cause was tried at the Wayne Circuit, in April, 1872, by the court without a jury. The evidence tended to sus-

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tain the answer, and the court found the facts substantially as therein alleged.

C. JORDAN, *for plaintiff.*

CHAS. McLOUTH, *for defendant.*

E. DARWIN SMITH, *J.*—This action is brought under the statute to recover the money received by the defendant upon a wager. The complaint states that the plaintiff and defendant, on or about the 20th day of June, 1871, at Palmyra, N. Y., entered into a wager or wagers upon the result or event of a horse race or races, then about to take place at or near Palmyra, aforesaid. *Bouvier* defines a wager to be “a contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event.”

This definition implies, that to every wager there must be two or more contracting parties having mutual or reciprocal rights in respect to the money or other things, that are wagered, and usually called the *stakes* of the bet or wager, and that each of the parties shall jeopardize something, and have the chance to make something or to recover the stakes or thing bet or wagered upon the determining of the contingent or uncertain event in his favor.

The proof in the case utterly fails to prove the complaint, or to show that there was any such contract of wager between the plaintiff and defendant.

The defendant did not put up or pledge or jeopardize anything to depend upon the result of the horse race in question. He put in no money and he was not in any event to receive any money. He had no chance to make or receive any money or other things depending upon the result of such races.

The plaintiff put into his hands \$60, as an entrance-fee to entitle him to run his horse over the race course in question,

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in competition with other horses for two purses of \$300 each. If there was any contract of wager, the other party to such contract must be the owner of the other horses, who put up a like sum or paid a like entrance-fee for the privilege of competing for such purses. The complaint does not set up any contract of wager with any such persons.

It sets up a contract of wager solely with the defendant, between whom and the plaintiff there was certainly no such contract. At most, the defendant might be deemed, perhaps, a stakeholder between the parties competing for said purses, if any contract existed between such persons.

But the defendant clearly was not such contracting party, and the plaintiff having entirely failed to prove the cause of action stated in the complaint, the cause must be dismissed.

Complaint dismissed.

Wisser agt. O'Brien.

N. Y. SUPERIOR COURT.

HENRY WISSER, plaintiff and appellant, agt. **JAMES O'BRIEN**, sheriff, &c., defendant and respondent.

Where on the trial of a cause for claim and delivery of personal property under a chattel mortgage payable *on demand*, and the question whether a demand was made before suit brought, was not raised on the trial — evidence being given by both parties and the cause submitted: *Held*, that if a demand was necessary before suit brought, it was too late to raise it for the first time *on appeal*.

A *chattel mortgage once refiled* within thirty days next preceding the expiration of the first year, continues valid without further refileing in subsequent years (*See Newell agt. Warren*, 44 N. Y., 244).

General Term. October, 1872.

Before FREEDMAN and CURTIS, J.J.

THE action was brought as an action of claim and delivery under the code. It was brought by plaintiff as mortgagee of chattels against the defendant who seized them under an execution against the mortgagor.

The defendant claimed that at the time of the seizure the mortgagor had a leviable interest in the property.

The mortgage was payable on demand. It was executed May 4th, 1867; filed May 5th, 1867; refiled May 4th, 1868, and May 8th, 1869.

The defendant seized the property under an execution issued August, 1869, on a judgment against the mortgagor of December 4th, 1867.

Upon the trial evidence was given on both sides, and at its close the court was requested by plaintiff's counsel to direct a verdict for the plaintiff, which motion the court denied, and to which ruling plaintiff's counsel duly excepted.

The court, thereupon, on motion of defendant's counsel,

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directed a verdict for defendant, to which direction plaintiff's counsel duly excepted.

Upon the verdict rendered as directed, judgment was entered, dismissing plaintiff's complaint upon the merits, and for defendant's costs, and the plaintiff appealed.

JOSEPH M. DIXON, *for appellant.*

A. J. VANDERPOEL, *for respondent.*

By the court: FREEDMAN, J.—It may well be that the doctrine of *Brown* agt. *Cook* (3 *E. D. Smith*, 123) and *Howland* agt. *Willett* (3 *Sandf.*, 607), to the effect, that where a chattel mortgage is payable on demand, it is payable immediately, and no demand of payment is necessary, before the mortgagor can maintain an action against the sheriff for taking the mortgaged property under an execution against the mortgagor, has been shaken by the decisions of the court of appeals in *Hull* agt. *Carnley* (1 *Kern*, 501); *Hull* agt. *Carnley, executrix* (17 *N. Y.*, 202); *Goulett* agt. *Asseler* (22 *N. Y.*, 225); *Manning* agt. *Monahan* (23 *N. Y.*, 539, and *S. C.*, 28 *N. Y.*, 585), by which that tribunal, as the court of last resort, settled the law of this state to be, that the mortgagor's possessory right for a definite period in the chattels mortgaged, coupled with his right of redemption, constitutes an interest which is liable to levy and sale on execution. But whether such really is or is not the indirect result of the last named decisions, and whether a mortgagor possessory right under a chattel mortgage payable on demand, and, therefore, payable immediately, does or does not constitute a leviable interest within the true meaning of these decisions, are questions which we do not deem necessary to determine here.

The objection that plaintiff failed to show a demand upon the mortgagor, does not seem to have been raised below. At the close of the plaintiff's evidence no motion was made for a non suit on the ground that plaintiff had not shown enough to maintain the action. The proof showed, that a written

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demand for the return of the goods had been made by plaintiff upon the sheriff prior to the commencement of the action. But as to a demand upon the mortgagor, the case appears to have been tried upon the assumption by the court as well as the counsel for the respective parties, either, that such demand was not necessary, or, if material, that it was duly made and that such fact was too incontrovertible to be disputed. Under these circumstances, and in view of the fact, that appellant's counsel has strenuously insisted, and we are inclined to believe, that, if the objection had been raised, it could and would have been readily obviated by proof, the ends of justice require, that we should not entertain the objection, if it is one, on appeal for the first time. Although it is true that, if a judgment, or order, or ruling, is right in point of law, on which the court below proceeded, is no reason for reversing it; yet it is equally true, that that rule is enforced only, when all the facts are before the court, and from them it appears that the correction of the theoretical error is not at all important to a correct decision of the question involved. Whenever there is reason to believe that an erroneous view of the law, expressed and enforced by the court below, induced the appellant to abstain from offering evidence, which would have been material to him under the view taken by the appellate court, or whenever it is made to appear, that a material fact was assumed in the court below to exist, without any objection on account of the want of evidence thereof, the appellate court in either case will decline to enforce the rule referred to.

The only question, therefore, remaining for our consideration is, whether or not plaintiff's mortgage, which has not been impeached as fraudulent against creditors, ceased to be valid against the execution creditors, represented by the defendant by reason of plaintiff's omission to refile a true copy pursuant to the requirements of the statute.

The evidence shows that the mortgage, which was payable on demand, was executed on the 4th of May, 1867; that

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the following day a copy of it was duly filed; that a copy was refiled on the 4th of May, 1868, that still another copy was filed on the 8th of May, 1869, and that the sheriff seized the property under an execution issued on the 5th of August, 1869, on a judgment obtained against the mortgagor on the 4th of December, 1867. Consequently, in directing a verdict against the plaintiff on the merits, no objection having been raised on account of the absence of proof above referred to, Justice McCUNN, who presided at the trial, must have held, as appellant's counsel insisted he did hold, that the re-filing of the 8th of May, 1869, was too late, and for that reason was no compliance with the requirements of the statute. But as the commissioners of appeals have since held in *Newell* agt. *Warren* (44 N. Y., 244), that a mortgage, once refiled within thirty days next preceding the expiration of the first year, continues valid without further refileing in subsequent years, the said ruling constituted a error, for which judgment must be reversed and a new trial is to be granted, with costs to appellant to abide the event.

CURTIS, J., concurred.

O'Brien agt. Mech. & Traders Ins. Co.

N. Y. SUPERIOR COURT.

JAMES O'BRIEN, sheriff of the city and county of New York,
agt. THE MECHANICS AND TRADERS FIRE INSURANCE COM-
PANY.

To bind the property of which manual delivery cannot be made, by the execution and service of an *attachment*, the *notice* accompanying the attachment of a levy upon all the property of the defendant, must specify the *particular property* sought to be reached, of which manual delivery cannot be made. A general notice with the levy of the attachment is insufficient for that purpose.

Trial Term, December, 1872.

VAN VORST, J.—This is an action brought by the plaintiff, as sheriff of the city and county of New York, to recover the amount claimed to be due on a policy of insurance, issued by the defendant to E. S. Caudler, whose property was destroyed by fire, in Bellville, Florida. The plaintiff claims to be entitled to bring the action in virtue of a levy and seizure claim, to have been made by him under certain warrants of attachment, issued out of the supreme court, in actions against Caudler in favor of certain of his creditors, residing in New York.

The 235th section of the code of procedure prescribes the manner in which attachments under the code shall be executed, so as to bind property, of which manual delivery cannot be made.

They are to be executed by leaving a certified copy of the warrant with the person holding such property, "with a notice showing the property levied on."

The claim upon the insurance company in favor of Caudler, at the time of the issuing of the attachment, had not

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been adjusted and was in fact in dispute, and was of the nature of property of which manual delivery could not be made.

The question raised by the defendant's motion to dismiss the complaint is, was the attachment served on the property in question, that is the claim of Caudler on the defendant, the insurance company? A certified copy of the attachment was served by the sheriff upon the defendant in this action, and it was accompanied with a notice, general in its form, claiming to attach "all the property, real and personal, debts, credits and effects of the defendant in the attachment, embracing money, bank notes, books, vouchers, papers," &c., &c., in the possession, or which might come into the possession, of the defendant in this action.

There was no specific mention in the notice, accompanying the copy attachment sent, of the policy of insurance in question, nor of the claim of Caudler therein. It was not pointed out in the notice.

It has been repeatedly decided that an attachment, accompanied by a notice of a levy upon all the property of the defendant, without specifying the particular property sought to be reached was insufficient and constituted no levy upon such specific property.

There have been repeated adjudications to this effect in this court (*Kuhlman agt. Orser*, 5 *Duer.*, 242; *Wilson agt. Duncan*, 11 *Abb.*, 3).

The court of appeals has also so decided in the case of *Clarke agt. Goodrich* (41 *N. Y.*, 210), in which the adjudications of this court on that subject are approved.

I have been referred to the case of *Kelly, sheriff, agt. Roberts* (40 *N. Y.*, 432), as holding a contrary doctrine.

But an examination of that case shows, that the sheriff in the first instance served a general notice with a certified copy of the attachment, and then demanded of the party a certificate of the claim on debt sought to be attached.

That a certificate was refused, and an order was obtained

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for the examination of the party, and that after such examination another copy of the attachment and general notice, with a special notice accompanying same, pointing out the particular claim to be attached, was served upon the party.

Under such circumstances the action was held, to be properly brought by the sheriff to recover the claim.

I cannot disregard these authorities and must acknowledge their controlling force, and must hold that the claim of Caudler against the insurance company has not been attached by the sheriff, and that the plaintiff has no such title to the property, as to enable him to maintain this action, and that the complaint must be dismissed.

In the matter of Berrian.

U. S. DISTRICT COURT.

In the matter of JOHN M. BERRIAN and CORNELIUS A. BERRIAN, bankrupts.

That where a partnership is in bankruptcy, and the separate estate of one partner is more than enough to pay his separate debts, at the amounts proved as they stood at the time of the adjudication, without computing interest thereon after that time, the surplus of such estate, over such debts, is to be added to the partnership estate, and applied to the payment of the joint debts, before paying such interest on the separate debts.

Southern District of New York.

JOHN FITCH, *register*. — This case is pending before me. The following question arose at the adjourned second meeting of the creditors of said bankrupts, held on the 12th day of November, 1872, and was stated and agreed to in writing, as follows: Claims against the separate estate of the bankrupt John M. Berrian, including computation of interest up to the date of the adjudication only have been proved.

At the meeting of creditors, held November 12th, 1872, it appears by the assignee's account, that he has collected sufficient money to pay all the debts proved against the separate estate of John M. Berrian, and leave a surplus.

Joint creditors of the bankrupts have proved claims against the joint estate of the bankrupts to the amount of \$49,712.-10 and upwards, which the surplus arising from John M. Berrian's separate estate is not sufficient to pay.

The separate creditors of John M. Berrian claim, that before the surplus of his separate estate is applied to the payment of the joint debts, the interests on the separate debts of John M. Berrian shall be computed from the day of ad-

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judication, and the surplus applied to the payment of such interest.

The assignee claims that the surplus is not to be applied to the payment of joint debts, and not to the payment of interest which has accrued since the adjudication on the separate debts of John M. Berrian.

The legal points to be decided by the court, arising in this case upon the statement of facts, are: First.—Can interest be allowed upon any claim, proven and allowed by the register as against any estate, after the date of the adjudication of bankruptcy? Or the question in this case may be stated thus: Is it lawful for the assignee to allow the separate creditors of the estate, interest on their respective claims, as proven, from the date of the adjudication to the date of the order of distribution, before paying the joint creditors of the estate? Second.—If interest can be so paid, then, upon what debts or claims, and under what circumstances?

Section 19 of the bankrupt act, applicable to this case, is as follows:

“That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day—a rebate of interest being made when no interest is payable by the terms of contract—may be proved against the estate of the bankrupt. All demands against the bankrupt, for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest.”

Section 19 of the bankrupt act is but a condensation of the insolvent laws of the respective states as well as of the English bankrupt laws, but more especially of the insolvent laws of New-York and Massachusetts. To the decisions of the courts of these two states, and also to the English courts, this court must look for precedents in the decision of these questions.

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By the uniform decisions of our state courts, interest follows the principal as soon as due, and as soon as a sum certain is found to be due between debtor and creditor, interest attaches. It also attaches in case of default in not paying money, the nondelivery of property, and the failure to perform a specific contract (2 N. Y., 135; *Id.*, 408). Such was the practice established under the English common law and the decisions thereunder.

The bankrupt law discharging a debtor from his debts, is an act of sovereignty, authorized by section 8, clause 4, of the constitution of the United States; is in derogation of the common law, suspends and invalidates the same—was required by considerations of public good, public policy, and for the welfare of the nation. In construing its provisions, the court should give it such a construction as will best carry out the intention of its makers. Such intention may be ascertained by reference to the causes which led to the passage of the law. And further, when the source, from which the words used in framing a statute, is found by the courts, viz., other statutes or judicial opinions, it is but reasonable that the decision of the courts upon such statutes should be followed with reason, prudence and judgment.

In the case of *Dudley* agt. *Mayhew* (3 N. Y., 9) the court held that, "Where a statute confers a right, and prescribes adequate means of protecting it, the person possessing the right is confined to it, and must be governed by it." That principle is applicable to this case, as the bankrupt law gives each creditor the right to prove his claim, and to receive whatever dividend may be paid thereon. If a creditor takes this right, it must be taken with the conditions and restrictions thereon set forth in the law, the same as he would have to take it at common law.

It was the uniform practice under the New-York insolvent law to compute interest upon claims up to the date of the assignment as provided for in the act. And where the claims proven were greater than the estate (which is always

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the case under state insolvent laws, where preferences are allowed, and the favored few divide the entire proceeds of the estate among themselves, and exclude the nonfavored creditors) interest could not be allowed. It was legal, however, to allow interest on the claim as computed after the payment of the principal. If such a thing could occur under any insolvent law allowing preferences, a similar rule prevailed in New Jersey. The insolvent law in that state contains the fundamental principles of the New York insolvent law. The proceedings therein being about the same with a similar ruling of the courts (*Saxton*, 572).

Section 40 of the insolvent law of the state of New York, provides that, "Every person, to whom a debtor (except one proceeding under the sixth article) shall be indebted on a valuable consideration, for any sum of money not due at the time of such distribution but payable afterwards, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed, for the time unexpired of such credit" (1 *R. L.*, § 18).

Under this provision interest was computed up to the date of the assignment (*Ex parte Murray*, 6 *Paige*, 204). A similar rule prevails in England. The English bankrupt law stops interest on claims at the date of the fiat or commission, and does not allow interest to be computed upon a claim against the estate of the insolvent (*Robson on Bankruptcy*, 106; *Bromley* agt. *Goodire*, 1 *Atk.* 79; *ex parte Badger*, 4 *Ves.*, 164; 10 *Gray*, 263; 9 *Ves.*, 588; 4 *Ves.*, 677; *ex parte Boardman*, *Cooks B. L.*, 208; 8 *Tauton*, 660; 2 *B. & A.*, 305., sec. 97, *English bankrupt law*, 1861.

By section 25 of the insolvent law of Massachusetts, "Debts due and payable from the debtor at the time of the first publication of the notice of issuing the warrant, may be proved and allowed against his estate at any meeting; and all debts at that time absolutely due, although not payable, may be proved and allowed as if payable, with a discount or

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rebate of interest when no interest is payable by the contract."

The bankrupt law requires all claims to be proven in accordance with the requirements of section 19 of the act. It is imperative, and no evasion of it can be allowed by the courts. Interest on the claims, as specified by the act, is to be computed in the manner so specified up to the date of the adjudication of bankruptcy, and then the interest must cease, unless upon the happening of certain contingencies, as I shall hereinafter describe (*In re Orne*, B. R. Sup., 13; S. C., 1 Bt., 361).

In this case, there are individual debts and an individual estate sufficient to pay the individual claims as proven and allowed by the court, and a surplus over. There are large claims against the joint estate, and there cannot be any surplus with which to pay the interest upon the individual claims against the separate estate, but the question arises the same, as if there was.

From a careful reading of section 19 of the bankrupt law and the portions of the insolvent laws, of New York and Massachusetts, from which said section was framed, I am clearly of the opinion that it was the intention of congress not to allow interest on ordinary contract debts after the adjudication, unless when there was a surplus after paying all the debts of the estate with interest up to the date of the adjudication, thus rendering the bankrupt a solvent debtor, under the same rules of law that are applicable to solvent debtors—namely, that he must pay his debts. Such was evidently the intention of congress as to all moneys arising from the estate of a bankrupt, which was to be distributed among the general creditors, but as to holders of specific liens, recognized by the act, and which were precedent to the bankruptcy, it is different; there the common law rule prevails, and interest follows the principal.

The bankrupt law does not effect the rights of the lien holders, but it does effect their remedy.

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The constitution does not give congress the power to affect a legal or vested right, but it does to alter, change, or vary a remedy. This is what the bankrupt law has done.

The same rule must hold in cases as between individual creditors and copartnership creditors, where there are individual assets and copartnership assets, as it is a settled principal of law as well as of mathematics, that rules applicable to the greater are also applicable to the less, therefore I infer, and the inference is fair, that it was not the intention of congress to allow interest on debts against a separate estate after the adjudication, even when there is a surplus, where there are copartnership creditors, until the copartnership creditors have been paid the amount of their respective claims. Such has been the construction placed by the courts of New-York and Massachusetts, upon this question of interest, arising under their respective insolvent laws (6 *Paige*, 204; 6 *Met.*, 317; 6 *Met.*, 200.

In this case the creditor of the separate estate of John M. Berrian claims that the assignee should pay him interest on his claim from the date of the adjudication of bankruptcy up to the date of the order of distribution, before any part of the assets of the separate estate of John M. Berrian can be applied to the payment of the joint creditors. This claim cannot now be allowed. A creditor of a separate estate, where there are joint creditors, cannot be allowed interest on his claim, until after the joint creditors are paid the amount of their respective claims, as proved and allowed.

The bankrupt law allows interest up to the date of the adjudication of bankruptcy, it adds the interest to the principal, and fixes the amount due, but interest accruing upon a contract after that time is not to be computed or taken cognizance of, unless, as above stated, depending upon certain contingences, thus, the bankrupt law becomes equal as well as just in its operations, by prohibiting the courts from computing interest on claims after adjudication, thus, all the creditors share *pro rata* respectively, when there is an

Muller agt. Higgins.

N. Y. SUPERIOR COURT.

ADRIAN H. MULLER and others agt. ELIAS S. HIGGINS.

On a motion for a new trial on the *judge's minutes*, no costs as for a *motion* can be allowed. The prevailing party is entitled only to a *trial fee* for the trial of an issue of fact.

Special Term, December, 1872.

APPEAL from the taxation of costs.

On the rendering of the verdict the defendant moved for a new trial upon the judge's minutes, under section 264 of the code. The motion was denied. Upon the taxation of the plaintiff's costs, the clerk disallowed any other than a motion fee for the motion for a new trial, and the plaintiff appealed.

MR. FOSTER, *for appellant.*

MR. BABCOCK, *opposed.*

MONELL, J.—The construction of this court in *Scudder* agt. *Gori* (28 *How.*, 155), of the 307th section of the code was, that a motion for a new trial upon a case, although necessarily made at the special term, carried the same costs, as upon an appeal from a judgment which could only be heard at the general term. Such motion for a new trial is named in express terms in the section, and is given the same costs as upon an appeal.

But a motion for a new trial made upon the judge's minutes is not a motion *on a case*; and although the grounds of the motion are the same, nevertheless, no *case* is required to be prepared, or settled, or used on the motion.

The construction, therefore, of the section in *Scudder* agt.

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Gori will not admit of its coming or being extended to any other motion for a new trial, than such as is made upon a case regularly made and settled.

Neither in my judgment is the plaintiff entitled to the fee prescribed for the trial of an issue of law. A motion of this character does not seem to me to be within the code's definition of a trial—namely, “a judicial examination of the issues between the parties” (§ 252).

But as this court at general term, many years ago, in an opinion which is fortified by several decisions of other courts (*Mechanics Banking Ass. agt. Kiersted*, 10 *How.*, 400), and subsequently sustained in the general term of the supreme court (*Place agt. The Butternuts W. & C. Co.*, 28 *How.*, 184), held, that a motion for a new trial on a case was a trial within the definition alluded to, I am constrained to apply the principle to a like motion, made upon the judge's minutes. There is no difference between the motions as respects this question.

If one is a trial, the other is equally so.

I am not aware of any subsequent decision or amendment of the code, which deprives the case referred to of its authority.

The plaintiff is entitled to a trial fee for the trial of an issue of fact, but not to any costs as for a motion.

Clarke agt. Goodridge.

COURT OF APPEALS.

WILLIAM M. CLARKE agt. FRANCIS GOODRIDGE, survivor, &c.

JAMES DRAKE *et al.* agt. THE SAME, defendant,
Three actions.

A sheriff having returned a warrant of attachment as "merged in execution," and also having returned the execution, *nulla bona*, is concluded by such returns, and has no further rights or powers by virtue of having had the attachment. His powers terminated with the return of the process. An alias execution subsequently issued, could not revive them.

The sheriff served a copy of an attachment on the Bank of the Republic, with a notice showing that he levied on "the bank account of the defendant, Goodridge, and any debt due or owing from the bank to him." At the time of this levy nothing was owing to Goodridge from the bank, and nothing remained to his credit in the bank account; but certain stocks of Goodridge were in pledge to the bank for loans, which stocks at the time were worth no more than the bank had loaned upon them. Subsequently an advance in stocks enabled the bank to sell them, so as to realize a balance which was passed to the credit of Goodridge in the bank account. After such sale no further levy was made by the sheriff, but instead thereof he had returned the process. *Held*, that the debt had not been attached, as it was not in existence at the time of the levy; and as no levy was made after, it was a subsisting debt.

The notice served by the sheriff, was a sufficient compliance with § 235 of the code. Per DANIELS and JAMES, JJ.

The sufficiency of the notice was not in question in the case Per GROVER and LOTT, JJ.

The notice was insufficient. HUNT, Ch. J.

A receiver in supplementary proceedings in Clarke's action, having become vested with all the personal estate of the judgment debtor, including debts owing to him (*Code*, § 298), at a time when no process was in the sheriff's hands, it was *held*, that the receiver was entitled to the property.

September Term, 1869!

THE cases of *Clarke agt. Goodridge* (41 N. Y., 210), and of *Drake et al. agt. Goodridge* (54 Barb., 78) are so imperfectly and incorrectly reported, that much misunderstanding has been caused and great difficulty experienced in determining what was actually decided in those cases.

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The reporter in 54 *Barb.*, 78, states that they were "motions to vacate attachments," which is entirely incorrect.

An examination of the papers used in the court of appeals shows that two motions, involving substantially the same question, were argued together.

The first was a motion made by Drake & Co., under § 294 of the code, to require the Bank of the Republic to pay over to the sheriff a debt owing from them to Goodridge, the sheriff holding a second or alias execution, issued to him by Drake & Co., after he had returned their prior execution and also certain attachments previously held by him, issued by Drake & Co.

The second was a motion made by Clarke and by John D. Taylor, a receiver, appointed in Clarke's action in supplementary proceedings against Goodridge, had, in said action, to require the sheriff to pay over to said receiver certain money held by him, collected on said alias execution from Verhuven & Co., another debtor of Goodridge; the said receiver having become vested with all personal property of Goodridge after the return of the attachment and of the first execution of the sheriff, and before the issuing of said second execution.

Clarke and Taylor, as receiver, opposed the first motion, and Drake & Co. opposed the second. The bank appeared, and offered to pay the money to either party entitled to it. Goodridge made no appearance. The only question, therefore, on either motion was, whether the receiver had become vested with the title to said two sums of money, as against Drake & Co. or the sheriff, holding their alias execution.

INGRAHAM, J., at special term, adjudged both sums to the receiver.

Drake & Co. appealed, and the general term, by CLERKE and BARNARD, JJ., overruled that decision, and discussed the sufficiency of the sheriff's proceedings under the attachment as constituting a levy; apparently overlooking entirely that that question was not before the court, on account of the

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sheriff's return of the attachments and of the execution into which they had been merged, before the receiver was appointed.

Clarke and Taylor then appealed to the court of appeals, where said general term decision was reversed, and the special term affirmed.

As the judges there differed somewhat as to the grounds on which they based their judgment, and as some of them also discussed the sufficiency of the levy, it is thought best to publish all of the opinions rendered, as the question of practice is an important one.

HAMILTON W. ROBINSON, *for appellants.*

CLARENCE A. SEWARD and JOHN H. REYNOLDS, *for respondents.*

GROVER, J.—It appears from the motion papers read at special term, that John D. Taylor, one of the appellants, was duly appointed receiver of the property of Francis Goodridge, in proceedings supplemental to execution in the case of *Clarke agt. Goodridge, survivor*, and that the order appointing him was duly filed and recorded, February 14th, 1868. This vested in the receiver the right to all the personal effects of the judgment debtor, including debts owing to him at that time (*Code, sec. 298*). This gave the receiver the right to the money collected by the sheriff of Henry F. Verhoven & Co. upon a debt owing by them to the judgment debtor, which collection was made, March 23d, 1868, unless the sheriff had acquired some lien upon the debt prior to the appointment of Taylor as receiver. At the time of such appointment it does not appear that the sheriff had in his hands any process against the judgment debtor. He received the money upon an execution against the judgment debtor, placed in his hands, March 23d, 1868. This it cannot be claimed, gave him any right to the money against the receiver. But it appears that the action in which the execu-

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tion issued, was commenced November 16th, 1867, and a warrant of attachment therein then obtained, and placed in the hands of the sheriff. Judgment was recovered therein, January 1st, 1868, and an execution issued to the sheriff, which was returned on the fifteenth of the same month, no property. The attachment was at the same time returned indorsed, "The within attachment has been merged in judgment, and execution issued thereon." Which return was signed by the sheriff. It does not appear that the sheriff at any time made any attempt in any way to serve the attachment, while it was in his hands, upon the debt against Verhoven & Co. The attachment is given by statute, and has the effect only given to it by statute. The code, sec. 232, makes it the duty of the sheriff, to whom the warrant of attachment is issued, to proceed thereon in all respects, in the manner required of him by law in case of attachments against absent debtors, to make and return an inventory, and to keep the property seized by him, &c., to answer any judgment which may be obtained in the action. Section 235 provides how it shall be served upon property incapable of manual delivery, including debts due to the defendant therein. None of these or other sections declare it any lien upon property, upon which it has not been executed. It is not a lien upon any such property (*The American Exchange Bank agt. The Morris Canal and Banking Company*, 6 Hill, 362). The attachment was, therefore, never a lien upon the debt in question. The sheriff had no lien, therefore, at the time of the appointment of the receiver, and none as against him. The special term were right in granting the order requiring the sheriff to pay the money, received upon the debt, to the receiver, and the general term erred in reversing it. Upon what ground the latter court relied for the reversal, it is difficult to perceive, as the opinion only discusses the sufficiency of the notice of the warrant of attachment, served by the sheriff upon the National Bank of the Republic, which has nothing to do with this case. It would appear that an opinion de-

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livered in some other case was printed with the papers in this case.

The order of the general term should be reversed, and that of the special term affirmed.

Lott, *J.*—The receiver was clearly entitled to the money in question under his appointment, made by the order of February 14th, 1868, in the first above entitled action, and perfected by the filing of the requisite bond on the next day, unless, as claimed by the respondents, it was subject to the attachment issued in one of the actions last above entitled on 16th day of November, 1867, and in which a second or alias execution was issued on the 23d day of March, 1868.

There is in my opinion no foundation for such claim.

1st. It is not shown that the money was due, or that any liability for its payment existed, when the attachment was levied.

2d. It does not appear that the debt, if subsisting, was ever levied upon.

3d. The return by the sheriff of the said attachment on the 15th day of January, 1868, with the indorsement thereon, that it was merged in the judgment and execution issued thereon, January 1st, 1868, and the return of said execution by him on the same day with the following endorsement, viz., "No personal or real property," show that it was not held under said attachment.

4th. The return by the said sheriff, on the said 15th day of January, 1868, of an attachment levied in another of the said three actions on the 31st day of October, 1868, with a like indorsement thereon as the other, and a further return by him on the same day that an execution issued in that action on the 1st day of January 1868, with the following indorsement, viz.: "Made on the within execution six thousand two hundred and twenty-one dollars and ninety-nine cents. I certify that there is no personal or real property in my county belonging to the within named defendant. out of which

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I could make the residue;" and a return on an attachment and execution issued in the other of said three actions on the same day as in the first of them above referred to, with a like return in all particulars as in that action made at the same time, are conclusive proof that the said debt was not subject to the attachment and execution first above mentioned, and under which the money is claimed by the sheriff.

The statement in his returns show that all the property levied on, had been converted into money, and was included in the sum of six thousand two hundred and twenty-one dollars and ninety-nine cents, made on one of those executions, and that on the 15th day of January, 1868, when the return of all the said executions was made, the defendant had no personal or real property, out of which any more money could be collected.

After such statement officially made, it appears to be preposterous to claim, that the debt in question had then been levied on, or was in any way subject to either of said attachments, and after the return thereof the sheriff's power under them terminated.

It follows from these considerations that Justice INGRAHAM in making his decisions at special term, correctly said, "The attachment was not a lien on the fund, and the money should go to the receiver."

The order then made should be affirmed, and that of the general term reversing it, should be reversed with costs.

HUNT, *Ch. J.*—Drake & Co. having commenced an action against Goodridge & Co., issued an attachment to the sheriff of the city and county of New York against the property of that firm. The sheriff served this attachment upon the National Bank of the Republic, by delivering them a copy of the attachment, accompanied by a notice that all property, effects, rights, debts, credits of the said Goodridge in their possession or under their control, would be liable to said attachment, and particularly that he attached the bank account

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and debts due from the bank to Goodridge. At this time, Goodridge had borrowed of the bank a certain sum of money, and had left with it certain certificates of stock as security for the indebtedness, which remained with the bank, the transaction being unclosed. It is not expressly stated, but I infer from the papers, that at this time there was no more value in the stocks pledged, than would pay the bank debt. Subsequently the stocks appreciated in value, were sold by the bank, and a balance of \$4800 remained to the credit of Goodridge. If the proceeding above taken constituted a levy upon Goodridge's interest in the securities, then the order appealed from must be affirmed. If not, then the money belongs to the receiver appointed in the suit of Clarke, and the order must be reversed. A failure to refer in the notice to the bank to the specific securities or to the transaction with the bank in such manner as to identify what it was intended to levy upon, is the precise ground of the objection to the attachment.

The transaction between Goodridge and the bank was a simple pledge of certain certificates of stock held by the former. Although there may have been default in Goodridge in paying his debt, the general property in the shares remained in him. His interest could only be directed by judicial proceedings on the part of the bank, or by a sale upon notice to him of the time and place of sale (*Story, Bail.*, 287, 2 *Kent's Com.*, 557, 581). Neither of these proceedings were taken, until long after the levy in question.

The statute contemplates a levy by the sheriff upon too kinds of property. 1st. Tangible property, as lands, goods, and chattels. 2d. Property incapable of manual delivery, such as rights or shares in the stock of an incorporation, or other property incapable of manual delivery to the sheriff (*Code*, § 232 to 235). The first class is to be levied upon by the sheriff, and taken into his possession in like manner or under an execution.

In executing the attachment upon the other kind of property, the sheriff is directed to leave a certified copy of the

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warrant of attachment with the head or agent of the corporation, or with the individual holding such property, with a notice showing the property levied on § 235. In *Greenleaf* agt. *Mumford* (19 *Abb.* 469,) it was held that a general notice, that the sheriff levied on the property rightsof action, etc., in the hands of the party, was a compliance with the provision of this section. This construction does away with the whole effect of the last clause of § 235, which requires that a notice should be given, showing the property levied on. Those words were intended to perform an office, and by them the levy is confined to the items specified in the notice; as in the present case, where the bank account and debts due from the bank to Goodridge, are specified. Such was the holding of the superior court of the city of New York in *Wilson* agt. *Duncan* (11 *Abb.*, 3), and in *Kuhlman* agt. *Orser* (5 *Duer*, 242). In my opinion these decisions are right. I agree, also, with the superior court in holding that the expression, "property incapable of manual delivery to the sheriff," is applicable to property, not only, which, in its nature is thus incapable of manual delivery, but also that which has become so from its peculiar position, as where it is under pledge, or consignment, with advances made upon the property.

The property here was subject to both these disabilities. It could not be levied upon bodily, because it consisted of choses in action, and for the further reason that the pledgee was entitled to its possession. The property should have been specified in the notice of the sheriff, and the interest of the debtor therein referred to with reasonable certainty.

Upon the merits the order should be reversed with costs.

Is the order appealable to this court? If so, it is under sub. 3 of § 11 of the Code, which gives an appeal "in a final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment." This is a proceeding in the action. (*Pitts* agt. *Davison*, 37 *N. Y.*, 235, *Batterman* agt. *Finn*, 34 *How.*, 108.)

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It also affects a substantial right, to wit, the loss or gain of \$4,800. (*The People* agt. *New York Central R. R. Co.*, 29 N. Y., 418, opinion of JOHNSON, J. See also *Tracy* agt. *First National Bank*, 37 N. Y., 523.)

The order must also be final to render it appealable. In one sense every order is final, until appealed from and reversed. It cannot be contradicted or impeached, but must be performed. In the sense of the Code an order is deemed final, which closes the subject matter to which it relates, or it is not final, when it is a preparation to other actions. Thus an order granting a new trial or refusing to strike out a pleading is not a final action overruling a demurer. In each case, the order is a preparation or preliminary to a further action, to wit: the proceeding to trial, or the putting in a further pleading. (*Duane* agt. *Northern R. R.*, 3 Coms. 545; *Paddock* agt. *Springfield Ins. Co.*, 2 Kern. 591; *Evans* agt. *Millard*, 16 N. Y., 242.)

An order vacating a judgment by confession, under the code, is final and is appealable. (*Belknap* agt. *Waters*, 11 N. Y., 477.) Such an order ends the action and all proceedings in it. *Kirby* agt. *Fitzpatrick* (18 N. Y., 484), was a case, closely resembling the one before us, as a principle in which, the order was held to be final and appealable. In that case a stakeholder being sued by two parties having conflicting claims, was discharged from the litigation under § 122 of the code, without formal substitution of another defendant, and a reference was ordered to ascertain and report the facts, and on the coming in of the report, the court awarded the fund and the general term affirmed the award. This was held to be a final order from which an appeal could lie to this court.

I think this order is appealable, and that the same must be reversed.

DANIELS J.—The plaintiffs in this action and William M. Clarke, plaintiff in another action against the same defendants,

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severally claim a fund amounting to about four thousand eight hundred dollars, now held by the Bank of the Republic. There can be no doubt but that the plaintiff in the action secondly mentioned, is entitled to this fund, through the receiver appointed in supplementary proceedings taken after the return of the execution unsatisfied, which was issued upon his judgment, unless a valid seizure of it were made under an attachment issued at the time of the commencement of the other action (*Porter agt. Williams, 5 Seld, 142*). At that time nothing appeared to be due from the bank to the defendant in the attachment. But afterward, on account of the advance in the market value of certain collateral securities held by the bank for the payment of its debt against him, the state of the account was so far changed as to render the bank a debtor instead of a creditor, as it previously appeared to have been. These collaterals were sold and converted into money after they had appreciated in value, and after satisfying the debt due to the bank for which they had been held as security, the sum in controversy remained as a credit to the defendant.

For the purpose of attaching property incapable of a manual delivery, as this very clearly was, the law required that a certified copy of the attachment, with a notice showing the property levied upon, should be left by the sheriff, with the president or other head of the association or corporation, or the secretary, cashier or managing agent thereof, or with the debtor, or individual holding such property, (*Code, § 235.*) This was shown to have been done in the present instance, if the notice was sufficiently specific and definite to constitute a compliance with the language of the statute.

The notice which was served on the bank, accompanied as it should, a copy of the attachment, and that showed that it had been issued against the defendant named in it as the surviving member of his firm. When the notice stated that the debts and credits of the defendant, in the possession of

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the bank, or under its control, or which might afterwards come into its possession, or under its control, would be liable to the attachment, and were required to be delivered into the custody of the officer, the bank for the purpose of properly understanding it, was required to read it with the copy of the attachment served, and when thus read, it sufficiently showed that the property intended to be affected by the service, was that of the defendant as a surviving partner. After this general statement, the notice proceeded to mention the property attached and that was the bank account, and debt due from the bank to the firm.

This was sufficient to show a seizure of the bank account, whatever it might prove afterwards to be, and to require the payment of any sum due upon it over to the officer serving the attachment. The collateral securities were held by the bank as an incident of, and as a means of adjusting that account, and afterwards paying the balance realized from them over to the debtor. The nature of the transaction was such that the proceeds of those securities after the sale of them would obviously and necessarily become a portion of that account as a credit to the debtor. And after extinguishing his liability, the balance would constitute a credit in his favor on the account against the bank. The attachment of the account was an attachment of whatever was found due to the debtor on its final liquidation and adjustment under the circumstances then existing, and which ultimately would determine the amount of the balance due to the debtor. It had the affect of placing the officer as to the account attached, precisely in the situation of the debtor to the bank, and that entitled him to the money in controversy, when it was afterwards realized from the securities.

This right was secured by the seizure of the account, to which the securities appertained and it was not dependent upon the officer's conformity with the requirement that an inventory of the property seized should afterwards be made, or that he should mention the seizure in the return after-

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wards made to the attachment. While the law rendered it the duty of the officer to have an inventory of the property made and filed, and to return a statement of the property seized, it nowhere provided that the lien of the attachment shall be divested by reason of his omission to do so. The officer rendered himself liable, by his omission, for his own violation of duty. but that did not have the effect of defeating the rights of the creditor under the attachment. The court in which the proceedings were had, will still have the power to permit the statute to be complied with in these respects. These omissions probably arose out of the supposition on the part of the officer, after he had served the attachment and notice, that nothing could be obtained from the seizure of the bank account. But that turned out to be a mistake, and the mistake was not sufficient of itself to discharge the lien created by the levy.

The order should be affirmed.

For reversal: LOTT, GROVER and HUNT, JJ.

For affirmance: DANIELS and JAMES, JJ.

Judgment reversed, and that of special term affirmed.

The People agt. The Town Auditors of Castleton,

OYER AND TERMINER.

THE PEOPLE agt. THE TOWN AUDITORS OF CASTLETON.

Where the indictment against the defendant charged him in eleven distinct counts with misconduct in having audited, and aided in auditing, certain town accounts against the town of Castleton, Richmond county, while the defendant was supervisor thereof:

Held, that although the accounts, which the defendant aided in auditing, were described in the indictment as "unjustly illegal," "pretended and extortionate," it nowhere, in any count, *averred the particular fact or facts* which would make the accounts "unjust, illegal, pretended or extortionate." Such an omission is fatal to the indictment,

An indictment taken at the sessions must, in the caption, state that the grand jurors were then and there sworn and charged—this caption should be affixed by the clerk in case it is removed from the sessions to the oyer and terminer—without such caption it will be held bad.

Richmond County Oyer and Terminer.

Second Department, Second District, October Term, 1872.

MOTION to quash indictment and order granting same.

This indictment was found by the grand jury at the court of sessions held in and for the county of Richmond, at the February term, 1872, and was afterwards removed to the oyer and terminer (3 *Rev. Stat.*, 5th ed., § 86 (sec. 76), *et seq.*, pp. 1024, 1025):

The indictment was for alleged "official misconduct," and consisted of eleven distinct and separate counts.

Seven of the said counts are in form as follows:

"County of Richmond, ss.:

"The jurors of the people of the state of New York in and for the body of the county of Richmond upon their oaths present, that heretofore, to wit., on the 20th day of November, in the year one thousand eight hundred and seventy-one, one was the supervisor of the town of Castleton, in

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the county of Richmond, and William W. Corbett, Matthew Tully, John Powers and Daniel Hegarty, were the justices of the peace of said town, and Patrick Kinny was the town clerk of said town, and by virtue of their said offices there and then constituted a Board of Town Auditors, for the purpose of auditing and allowing the accounts of all charges and claims payable by the said town, and then and there duly met at said town as such Board of Auditors for the purpose of auditing and allowing such accounts; that one Henrietta S. Winegar then and there presented to such board, to be then and there audited and allowed a certain unjust, illegal and extortionate charge and claim against said town of Castleton, for certain illegal and pretended matters therein stated, namely, for the renting and rent of an office to and for the town clerk of the said town of Castleton, amounting to the sum of fifty dollars.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said William W. Corbett, Matthew Tully, John Powers, Daniel Hegarty and Patrick Kinny, so being members of said Board of Town Auditors, and so being such officers as aforesaid, did then and there, to wit, on the day and year and at the town and county aforesaid, knowingly, wilfully and corruptly, audit and allow the aforesaid illegal and pretended charge and claim at the sum of forty-five dollars, they then and there well knowing the same to be illegal, unjust and extortionate, against the form of the statute in such case made and provided, contrary to their duty in their offices aforesaid, and against the peace of the people of the State of New York and their dignity."

And four of the said counts are in form and substance as follows;

"And the jurors aforesaid upon their oaths aforesaid, do further present, that on the twenty-eighth day of November, in the year eighteen hundred and seventy-one, was the supervisor of the town of Castleton in said county,

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and Matthew Tully, William W. Corbett, Daniel Hegarty and John Powers were the justices of the peace of said town, and Patrick Kinny was the town clerk of said town; and said officers, by virtue of said offices, constituted the Board of Town Auditors of the said town of Castleton; that, on said day, at said town, said officers were duly met and convened as such board of town auditors, and it there and then became and was the duty of said town auditors to audit and allow all just and legal claims and charges against said town which should be presented to them as such auditors, and as should be verified according to law; that in and by section fifty-one, of article five, of title four, of chapter eleven, of part one, of the Revised Statutes of the State of New York, it is provided as follows: No account shall be audited by any board of town auditors, or supervisors, or superintendents, of the poor, for any services or disbursements, unless such account shall be made out in items and accompanied with an affidavit attached thereto, and be filed with such account, made by the person presenting or claiming the same, that the items of such account are correct, and that the disbursements and services charged therein have been in fact made, or rendered, or necessary to be made or rendered, at that session of the board, and stating that no part thereof has been paid or satisfied; that it was the duty of said officers and of each of them to prevent the auditing and allowing of any bill or claim or account which was not made out in items and sworn to as above set forth; that in violation of their duty as aforesaid, the said officers so composing the board of town auditors aforesaid, and being so met and convened as aforesaid, for the purpose aforesaid, on the day and at the place last aforesaid, did knowingly, willfully and corruptly, and in violation of their duty as such officers, audit and allow a certain pretended claim or account, there and then presented to them by one against said town, amounting to the sum of one hundred and one dollars and fifty-six cents, for pretended

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services of him, the said as supervisor of said town ; that said bill, claim or account was not, at the time it was so presented to said board of town auditors, nor was it ever, made out in items, nor was it accompanied with an affidavit attached to or filed with said claim or account that the items of said account were correct, and that the disbursements and services charged therein had been in fact made or rendered, or necessary to be made or rendered, at that session of the board, and stating that no part thereof had been paid or satisfied, nor was any affidavit whatever attached to or filed with said claim or account ; all which said officers then and there well knew. And the jurors aforesaid do present, that on the day and at the place last aforesaid, in manner and form aforesaid, the said Matthew Tully, William W. Corbett, John Powers, Daniel Hegarty, and Patrick Kinny, so composing said board of auditors, and so met as such as aforesaid, did then and there knowingly, wilfully and corruptly audit and allow the said bill or account, and in so doing did knowingly, wilfully and corruptly neglect their duty in their offices aforesaid, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity."

One of the defendants, by permission of the court, at the October term, 1872, of the Oyer and Terminer, withdrew his plea of "not guilty," and moved to quash the indictment, and upon the following grounds :

And now said comes and moves that the indictments against him be quashed.

I. Because the said indictment and the counts thereof, do not allege and set forth fully and sufficiently the authority whereon the alleged proceedings were based, or facts sufficient to show that the alleged proceedings were had by any person or person duly authorized, and their authority, and jurisdiction, and that the same were within their jurisdiction (*Edge agt. The Com.*, 17 *Barr*, *Pz.* 275 ; *Com. agt. Ruff*, 9

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Watts, Pa. 114; *Caldecott, K. B.*, 183; 1 *Wharton* § 285, *n. j.*; *State agt. Copp*, 15 *N. H.*, 212; *State agt. Hoit*, 3 *Foster*, 335).

II. Because said indictment and the counts thereof do not set forth and allege fully and specifically the acts charged to be the "final and complete auditing and allowing" of the several accounts therein mentioned (*People agt. Stocking*, 50 *Barb.*, 573).

III. Because the matters and things alleged in the first, second, third, fourth, fifth, eighth, tenth and eleventh counts of the indictment do not constitute any crime under the common law, nor under the statutes of New York. (a) The duty was judicial. (b) It involved the determination whether the claim presented was chargeable to the town, &c. (c) A judicial officer is not indictable unless he acts from bad motives corruptly—the offense is in the "corruption" and that must be averred (*People agt. Norton*, 7 *Barb.*, 477).

IV. Because the matters and things alleged in the first, second, third, fourth, fifth, eighth, tenth and eleventh counts in the indictment are insufficient and bad upon their face respectively as being charged and stated indefinitely (*People agt. Coon*, 15 *Wend.*, 277; *People agt. Wilber*, 4 *Park.*, *Cr.* 24; *Sherman agt. Bd. of Supervisors*, 30 *How.*, 173; *People agt. Stone*, 9 *Wend.*, 191; *People agt. Supervisors Queens County*, 1 *Hill*, 195; *People agt. Williams*, 4 *Hill*, 9; *People agt. Thomas*, 3 *Hill*, 169).

The use of the words "*knowingly, wilfully and corruptly*" in these counts does not make the acts so charged indictable (1 *Wharton*, § 402, *n. f.*).

V. Because the second count of the indictment is void for duplicity.

VI. Because the sixth, seventh, eighth and ninth counts in said indictment are void for uncertainty, indefiniteness and insufficiency; it not appearing by any reference in said counts what, if any, statute was violated as therein charged (*Arch-*

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bold, vol. 1, 285, 286, n.; *Wharton*, vol. 1, § 364, n. f.; *Wharton*, vol. 1, § 639, n. p. & g.; *Wharton*, vol. § 379, n. m. (a) The said counts are not within the statute as quoted in the indictment. Laws of 1845, ch. 180, "act to reduce the number of town officers, and town, and county expenses, and to prevent abuses in auditing town and county accounts," amended by laws of 1847, ch. 490.

VII. Because there is no "caption" to the indictment when it is brought into this court.

JAMES EMOTT, WILLIAM H. ANTHON, and EDWARD B. MERRILL, *for defendant*.

SIDNEY F. RAWSON, *district attorney, for the people*.

TAPPEN, J.—The defendant moves to quash the indictment upon the ground of insufficient allegations. The indictment contains a number of counts, charging the defendant with official misconduct, in having audited and aided in auditing certain town accounts against the town of Castleton while the defendant was the supervisor thereof. The insufficiency alleged against the indictment is chiefly that it fails to aver wherein such accounts were unlawful.

There are eleven distinct counts as follows:

1. For auditing a bill of \$50 for rent of town clerks office.
2. For auditing a similar bill of \$131 50, and for filing papers and other services by town clerk.
3. For auditing a bill of \$70 to clerk of highway commissioners.
4. For auditing a bill of \$50 to clerk of bridge commissioners on Dougan bridge.
5. For auditing a bill of \$77 to a deputized constable.
6. For auditing a bill of \$101 to the defendant without items or oath.
7. For auditing O'Brien's claim of \$80 without items or oath.

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8. For auditing bill of New Brighton village of \$50 without items or oath.

9. For auditing Mc Carthy's bill of \$15 without items or oath.

10. For auditing bill of clerk to highway commissioners for \$70.

11. For auditing bill of Dempsey for repairing two bridges.

In the *People agt. Stocking*, (one of the supervisors of Erie) the indictment contained averments that the defendant obtained articles for his own use and, well knowing the account was not a lawful charge against the county, voted to allow the same, and that it was allowed and paid (50 *Barb.*, 575).

Here all the ingredients of an offense are well averred.

Undoubtedly the offense alleged against the defendant in the case at bar would amount to a misdemeanor if proper and sufficient words were used to that end. And the facts constituting an offense must be stated with as much certainty as the nature of the case will admit (*The People agt. Dord*, 9 *Barb.*, 671).

The accounts which the defendant aided in auditing are described in the indictment as "unjust, illegal" or as "pretended and extortionate," but no where does the indictment in any count aver the particular fact which would make the account "unjust, illegal, pretended or extortionate," and it may very well be that some of the accounts or some portions of the different claims so audited, might not be either illegal or unjust—and it would relieve the indictment of all doubt as to its sufficiency if the particular fact or facts were averred which would put the defendant upon his defense at the trial by a timely and proper appraisal in the indictment of the specific character of the particular act or offense which he is called to defend and to justify (*The People agt. Gates*, 13 *Wend.*, 317).

So held in the *People agt. Standish*, (6 *Park, Crim. R.*, 111) on an indictment for illegal voting.

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The indictment in that case averred that the defendant not being a qualified voter did "wilfully, knowingly and corruptly" vote, &c.

And, these words of description do not suffice to uphold an indictment without sufficient averments of fact. The language of the court (WELLS, J.) in this case is, that the facts which give character to the act and render it criminal should be alleged, otherwise the great object of a pleading that of informing a party what he is called upon to answer, will be defeated.

The defendant, on the motion to quash, further objects that the indictment is without proper caption. On a reference to the authorities, it will be seen that it has been held that an indictment taken at the sessions must, in the caption, state that the grand jurors were then and there sworn and charged—the captions should be affixed by the clerk in case it is removed from the sessions to the Oyer and Terminer and in such case and without such captions it has been held bad (*The People agt. Guernsey*, 3 Johns. Cases, 265; 3 Wend., 314).

The practice involved in this objection will be found very fully discussed and criticised in *The People agt. John Bell* (*Addison Reports, Penn.*, 176–180). The objection ought not to be a good one after a trial on the merits, but where it is made in due form before trial it is to receive the consideration sanctioned by the courts in that respect. In 1 *Whar. Crim. Law*, § 402, it is said the use of the words "knowingly, wilfully and corruptly" do not make the acts so charged indictable. The following authorities are relied upon by the defendant as sustaining the motion to quash; *People agt. Norton*, (7 Barb., 477), illegally granting license; *People agt. Coon*, (15 Wend., 277); *People agt. Brook*, (1 Denio 457,) Justice refusing to take affit.; *People agt. Williams*, (4 Hill., 9), false pretenses; *People agt. Stone*, (9 Wend., 191); *People agt. Thomas*, (3 Hill., 169).

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The authorities quoted sustain the views here enunciated and hold the objection to be well taken and the decisions indicate it to be the duty of the court. Where motion is made to quash before trial in due time to grant it. Order, that the indictment against the defendant be quashed.

METCALFE, Co. J. I concur in the above.

In the matter of Swift.

U. S. DISTRICT COURT.

In the matter of SEPTIMUS E. SWIFT, Bankrupt.

The provisions of § 33 of the bankruptcy act as amended July 14, 1871, providing for the discharge of the bankrupt from all debts contracted prior to the first day of January, 1869, construed.

A tenant on the 1st day of May, 1868, surrendered his lease, which had another year to run, under a bargain that the landlord should rent the premises for the remainder of the term for what he might be able to get for them, and apply the rent to the credit of the tenant, and that the tenant should pay to the landlord such sum as the rent so received by him subsequent to such surrender should fall short of the rent reserved in the lease so surrendered with interest on quarterly deficits from the close of each quarter respectively.

At the end of the year a considerable amount having so become due, the landlord recovered a judgment therefor. After the recovery of this judgment, the bankrupt filed his petition in bankruptcy.

Held, that the claim was contracted prior to January 1st, 1869, to wit: on the day of surrendering the lease and entering into the contract to pay the deficiency of rent.

Southern District of New York.

At Chambers, 4 Warren Street, in the city of New York, in said district, on the 27th day of November A. D., 1872.

I, ISAAH T. WILLIAMS, the register in charge of the above entitled matter, do hereby certify, that Septimus E. Swift, the abovenamed bankrupt, has in all things conformed to his duty under the act of congress entitled "an act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, 1867," and has conformed to all the requirements of the said act, *unless* the district judge should be of opinion that a certain judgment against the bankrupt, recovered by Mr. Goold Hoyt, executor, &c., amounting to \$9,144 43, on the first day of April, 1871, duly proved against the estate of the bankrupt, on the 2d day of January 1872, be a debt "*contracted*" subsequently to the first day of January, 1869. The judg-

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ment in question arose out of the following facts. In April 1865, the bankrupt leased of the creditor, Mr. Hoyt, executor, &c., certain premises situate in the city of New York, for the term of five years, from May 1st, 1865, reserving rent payable quarterly. In May, 1868, the tenant surrendered, and the landlord accepted the surrender of, the lease under a contract or agreement that the landlord should let the premises in question during the remainder of the term, for the most he could obtain therefor, and that at the expiration of the time, the bankrupt should pay to the creditor such sum as the rent, so received by him since such surrender, should fall short of the rent reserved in the lease, with interest on quarterly deficits from the close of each quarter respectively.

At the termination of the lease there was a large deficiency which was prosecuted to judgment as above stated.

There can be no doubt that the judgment, as it was obtained prior to the filing of the petition in bankruptcy, is provable against the estate, and that the judgment creditor can be heard to object to the discharge.

The only question presented is, was that debt contracted prior to January 1st, 1869? The decision in *re Williams* (2 B. R., 79), and the decision in *re Gallison et al.* (5 B. R., 353), arose upon the question whether a judgment creditor whose judgment was obtained after the filing of the petition in bankruptcy, is a debt provable against the estate of the bankrupt.

It was held in these cases that such a debt was not provable against the estate or payable out of the assets of the bankrupt, but that it was a debt which accrued after the filing of the bankrupt's petition and would be unaffected by his discharge even though the claim upon which the judgment was founded were owing and due before the filing of the petition in bankruptcy. The ground of this decision was that the claim upon which the judgment was founded was extinguished by the judgment.

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Assuming that the bankruptcy act requires such a construction, I do not think the court should feel compelled under these authorities to hold that the claim in this case was *contracted* by the judgment rendered thereon even though a judgment be conceded to be a contract between the parties.

The act, as amended July 14, 1871, uses the word "contracted," in contradistinction to the word, accrued, or the phrase, became due or payable. A debt would seem to be contracted, when the contract under which it becomes due or payable is made. Even a liability to pay rent is contracted when the lease is executed, for it is under that contract, and under that alone, that the rent becomes payable. But in the present case if the debt in question were not contracted at the time the lease was made in 1865, how can it be denied that it was contracted in May, 1868, when the bankrupt surrendered the lease and contracted, in consideration of its acceptance, that he would pay, at its expiration, such sum as the rent the landlord might receive for the use of the premises should fall short of the rent reserved in the lease; all the consideration there was for this promise, was the acceptance of the surrender of the lease by the landlord, and this consideration passed at the time the contract was made. The fact that the amount of the liability was not then, and could not then, be ascertained, did not render the contract incomplete or in any wise invalid. The amount was the only thing that was left to any uncertainty, but (it was capable of being reduced to certainty before it should fall due) such uncertainty has never been thought to have the effect to render the contract incomplete.

It is still strenuously urged by the counsel for the creditor that the decisions above referred to are in point, and establish the doctrine that a debt evidenced by a judgment bears date to all intents and purposes as of the time or docketing the judgment.

It is argued, that these decisions establish the doctrine that

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a simple contract is extinguished by a judgment recovered thereon, as a matter of law and that what is extinguished by law, cannot legally be a debt or a contract, of which the law can take notice.

It is argued that if a debt, due prior to bankruptcy but upon which a judgment is docketed after bankruptcy, be so extinguished that the court in bankruptcy can take no notice of it as a debt against the estate of the bankrupt, then, *a fortiori*, a contract made prior to January 1st, 1869, for the payment of money, the amount of which is contingent upon events to occur after January, 1869, cannot but be extinguished by a judgment obtained after the period in question. *In re Gallison*, the learned judge speaks of the judgment as a "new contract" which operates to extinguish the former contract, and it is argued that congress in the amendment above referred to, could not have referred to an *extinguished* contract.

To all this it may be answered, that the decisions, referred to, are not quite in point. They do not decide that the debt evidenced by a judgment was not contracted prior to the rendition of such judgment. Even the application of the doctrine of those cases to the facts before these courts respectively, is exceedingly questionable as a matter of authority. An opposite doctrine is held in the following cases: *Harrington* agt. *McNaughton*, (20 *Vt.*, 293); *Downer* agt. *Rowell* (26 *Vt.*, 397); *Dresser* agt. *Brooks* (3 *Barb.*, 429); *Fox* agt. *Woodruff* (9 *Barb.*, 498); *Church* agt. *Rawling* (3 *N. Y.*, 216). The doctrine of the case of *Williams* above referred to, was dissented from by this court, *in re Brown* (3 *B. R.*, 145). This decision was followed substantially by *WHITNEY, J. in re Vickery*, and by *LONGYEAR, J. in re Crawford* (3 *B. R.*, 171). The doctrine that a judgment extinguishes the simple contract upon which it is founded, is simply a principle of evidence. In *Clark* agt. *Rawling*, (3 *N. Y.*, 216), the court held that "a judgment upon a contract technically merges the demand, but not in so

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complete a sense that the court cannot look behind it for the purpose of protecting equitable rights of the parties especially in cases of insolvency and bankruptcy." A similar doctrine is affirmed in 12 *Pick*, 572; 1 *Cow.*, 316; 3 *Barb.*, 429; 3 *Barb. Ch.*, 360; 3 *Cow.*, 147. To say that the debt in question was not contracted in May, 1868, but that it was contracted on the day judgment was docketed upon it in the office of the clerk, would not square with the common sense of mankind.

I, therefore, certify, that Septimus E. Smith, the above named bankrupt, has in all things conformed to his duty under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867," and has conformed to all the requirements of the said act, except in the particulars covered by the specifications of objections to the discharge of said bankrupt filed by the said Goold Hoyt, executor, &c., a creditor as aforesaid.

All of which is respectfully submitted.

F. M. SCOTT, *for creditor.*

H. W. FOWLER, *for the bankrupt.*

BLATCHFORD, *J.*—In this case I am of opinion that the debt due to Goold Hoyt, executor, &c., represented by the judgment recovered April 1, 1871, and from which debt the bankrupt seeks a discharge, was contracted prior to the 1st day of January, 1869, namely, when the agreement of May, 1868, was made.

The case will, therefore, stand for hearing on the specifications filed by said creditor.

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SUPREME COURT.

ALLEN NIMS agt. STELLA SABINE and another.

When a judgment creditor dies and his executor is appointed, who, within a year from the death, applies by affidavit to the court, without notice to the judgment debtor, and obtains an order reviving the judgment in the name of the executor, and authorizing an execution on which real estate is afterwards sold :

Held, in an action of ejectment by the purchaser, that the execution was *voidable*, not *void*, and one not holding under the judgment debtor could not raise the question.

In such case the sale is good, though more than ten years have elapsed since the docket of the judgment, and no lien is necessary to authorize a sale as against the defendant in the execution or trespassors.

When defendant is in possession, without right, after the determination of a life estate, no notice to quit is necessary.

Jefferson Co. Circuit, Sept., 1872.

THIS cause having been duly called in its order upon the calendar, and a trial by jury having been duly waived by the respective parties in open court, and the court thereupon, without a jury, having proceeded to hear the proofs and allegations of the parties, and having duly considered the same, finds as matter of fact :

That on the 31st day of Dec., 1828, William Smith, as receiver of the estate of William Waring, deceased, duly conveyed to Eben H. Sabine the premises described in the complaint, who afterwards entered into possession thereof, and on the 3d day of Dec., 1847, conveyed the same to George W. Hungerford, who went into possession thereof.

That said Hungerford, on the 8th March, 1848, executed to Eben H. Sabine a lease of said premises for the term of the lives of Ebenezer Sabine and Clarissa his wife and the survivors of them, said Ebenezer and Clarissa being the parents of said Eben, and under said lease said Ebenezer and

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Clarissa occupied said premises until the death of said Clarissa in Dec, 1871, said Ebenezer having previously died; and that the defendants, who are the children of said Ebenezer and Clarissa, lived with their parents to their death and the death of their mother, and thereafter continued in possession up to the commencement of this suit, and still are in possession.

That on the 26th of Oct., 1850, said George W. Hungerford and wife conveyed the said premises to Henry Holmes, and on the 18th April, 1853, Thomas Hungerford duly recovered, in the supreme court, a judgment against said Holmes for \$4,383 32 damages and costs, which judgment was, at said date, duly docketed in said county of Jefferson where said premises are situated.

That on the 1st day of Dec., 1853, an execution was duly issued on said judgment, and in Dec., 1854, a payment of \$3,000 was made on said judgment.

That on April 9th, 1862, the said Thomas Hungerford died, and thereafter, on the 14th May, 1862, letters testamentary upon the will of said Thomas were duly issued to James F. Starbuck, executor in said will named, by the surrogate of Jefferson county, and said Starbuck took on himself the duties of said trust.

That on the 4th day of April, 1863, the said Starbuck, as such executor, applied by affidavit to said supreme court, and obtained an order reviving the said judgment in the name of said executor, and substituting him as plaintiff, and giving him leave to issue execution on said judgment for the balance due thereon, being the sum of \$1,884.14, and in pursuance of said order an execution was duly issued on said judgment on the 6th April, 1863, and delivered to the sheriff of Jefferson county who levied on the said premises, and on the 10th day of June, 1863, duly sold the same to Morris Bannister, and executed to him a certificate of sale.

That on the 31st day of August, 1864, Gilead W. Candee, a judgment creditor of said Holmes, duly redeemed the said

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premises, and on the 13th Sept., 1864, the sheriff executed to said Candee a sheriff's deed thereof in due form of law, and on the 5th Oct., 1870, said Candee conveyed the same to plaintiff.

That said plaintiff, before the commencement of this suit, and after the death of said Clarissa Sabine, demanded possession of said premises of the defendants, and they refused to deliver the same, and this action was commenced on the 13th day of March, 1872.

That the value of the use and occupation of said premises from the death of said Clarissa to the commencement of this action, is the sum of twenty-five dollars.

As matter of law, the said court finds:

That the plaintiff, at the time of the commencement of this action, was the owner in fee of said premises, and entitled to the possession thereof.

That the plaintiff is entitled to recover of the defendants the possession of said premises and the sum of twenty-five dollars for the value of the use and occupation to the commencement of this action.

And judgment is ordered accordingly in favor of said plaintiff against the defendants and the costs of this action.

M. H. MEREDIN, *for plaintiff.*

JOHN LANSING, *for defendants.*

HARDIN, J.—The defendant's learned counsel is correct in assuming that after the lapse of a year from the death of the plaintiff in a judgment, the remedies presented by the Code for revival of judgment and for leave to issue execution is by action and not by motion (*Code*, § 121; *Jay agt. Martine*, 2 *Duer*, 654; *Wheeler agt. Dakin*, 12 *How.*, 537; *Swift agt. Flanagan*, 12 *How.*, 438; *Miller agt. Rossman*, 15 *How.*, 10; *Bellinger agt. Ford*, 21 *Barb.*, 311).

In the last case it was held that the order was void as the party was dead, and had been for over two years when the

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order was granted for leave to issue execution, and no executor or administrator had been appointed to represent the estate of the plaintiff in the judgment.

And it was there held that an execution issued after five years was not void but only voidable (*See op. of BOCKES*).

But in this case, an executor who had been duly appointed and qualified to represent the estate of the deceased plaintiff, and, in law, entitled to collect and control the judgment, applied to the court on motion and obtained an order reviving the suit and authorizing execution to issue.

Had the defendant appeared and taken an objection the court would have held doubtless that the relief sought should not be granted upon motion, and turned the executor over to an action, which is a substitute for the old writ of *scire facias* (*Ireland, ex., agt. Litchfield*, 22 How., 178; *Cameron agt. Young*, 6 How., 372; 28 How., 514 and 516).

But in this case no objection was taken by the defendant in the judgment and execution, and none is now taken by a party to the record.

The defendant here seeking to avoid the effect of the order and execution are strangers to the record, and not in a situation to avail themselves of irregularities, or to escape the force of a voidable execution (1 *Lansing*, 405).

The court had jurisdiction of the subject matter and of the parties, and permitted an order to be entered which remained in force, and the property of the defendant in the execution was sold, and has come through the proceedings to a purchaser in good faith, whose title is to be upheld, unless the proceedings through which it was derived, are wholly void.

The order and execution have not been assailed by the defendant in the judgment; so far as he is concerned there has been an acquiescence in the order and execution.

The motion was made by the executor as a substitute for the action which might have been brought, and in which the executor would not only have been entitled to revive

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the judgment and have execution, but would have recovered a bill of costs (*Op. of Bosworth*, 22 *How.*, 183).

Mr. Starbuck, the executor, by the motion appealed to the equitable powers of the court. That motion was a simple and summary substitute for an action which he might have maintained. The equitable power of the court was exercised when the order was granted, and it was in the power of the defendant to avoid it, but it was not absolutely void (3 *Cowen*, 39; *The Union Bank agt. Bush*, 36 *N. Y.*, 636).

Personal representatives may collect (*Code*, § 283). Under the former practice, if the execution was issued too late, and was in fact irregularly issued, it was not void, but only voidable (*Woodstock agt. Bennett*, 1 *Cowen*, 711).

It was determined in *Bank of Genessee agt. Spencer*, that an execution issued after five years without leave of the court is not void, but only voidable, and that whether such an execution should be set aside or not, was a matter resting in the discretion of the court (*Op. DENIO*, 18 *N. Y.*, 150 and 155; *Winebrewer agt. Johnson*, 7 *Abb.*, *N. S.*, 202).

The learned counsel for the defendants, in his elaborate argument submitted in this case, insists that the judgment against Holmes had ceased to be a lien on his real estate, and that the sale and sheriff's deed were, therefore, void.

In support of this position it is insisted that the amendment of the Code in 1851 changed the rule in reference to the liens of judgments, and restricted the lien to ten years. Section 282 of the Code does not in terms repeal the provisions of the Revised Statutes in respect to judgments.

It is further insisted by the learned counsel that section 282 expressly limits the time to ten years as to the defendant in the judgment, and that after the lapse of ten years there is no lien upon the real estate of the judgment debtor.

Whether that is the correct rendering of the provisions

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of the Code is not necessarily involved in the decision of this case.

As to purchasers, creditors, or mortgagees in good faith, the time during which a stay or an appeal shall have been effectual shall not constitute any part of the ten years.

It is insisted that the words used in connection with the stay as to creditors, purchasers, and incumbrancers in good faith, declare that the time of such stay shall also be subtracted from the ten years, in which the lien shall exist, against the defendant in the execution.

But suppose that to be granted, the sale upon the judgment in this case can be upheld and declared effectual as to the defendant in the judgment and execution unless the provisions of the Revised Statutes are repealed in respect to the effect of a judgment upon the property of a judgment debtor.

By an amendment of the Code in 1851, it was provided, in section 291, that the existing provisions of law not in conflict with the chapter containing that section "relating to executions and their incidents, the property liable to sale on execution * * * shall apply to the executions described by that chapter."

The execution, therefore, issued to sell the premises in question, was authorized by the 291st section of the Code and the provisions of the Revised Statutes.

By section 30 of *R. S.* (found at page 371 of 2 *R. S.*, *Edms. ed.*), it was provided that "all judgments shall bind and be a charge upon the lands, &c., of any person, against whom any such judgment shall be rendered which such person may have at the time of docketing, or which such person shall acquire at any time thereafter; and such real estate and chattels real, shall be subject to be sold upon execution to be issued on such judgment.

Then follows section 4, in respect to purchasers in good faith and subsequent incumbrancers, with a limitation as to them of ten years.

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The counsel correctly maintains that the lien, as to such persons, continued only ten years, and that the issuing of an execution did not extend, as to them, the lien beyond ten years (5 *Cowen*, 294; 18 *Wend.*, 621; 9 *Wend.*, 157; 1 *Ed. Ch.*, 619).

And it was held that the sale must actually take place within the ten years, as to such persons as the statute named in restricting the lien to ten years.

At common law, the real estate could not be sold on an execution, and the early statutes which authorized the sale have been adopted, and the Revised Statutes, in § 3, prescribed the effect of a judgment on real estate of the debtor.

As to the debtor, a sale of his real estate could be made, without the docket of a judgment in the county where his realty was situated, and it became effectual to pass his title, in virtue of the provision of the statute, whether lien existed or not (*Correy* agt. *Comeleus*, 1 *Barb.*, ch. 582; *Haverly* agt. *Becker*, 4 *N. Y.*, 169; *Blasson* agt. *Barry*, 1 *Lansing*, 192).

In the last case, SMITH J. says: "If the lands had been sold on the execution while he held the title, the sale would have been effectual." In that case no docket had been made of the judgment against Cheney, one of the debtors alluded to in the opinion, and in the absence of the docket, of course no lien was created.

No provision of the Code can be found, which expressly takes away the effect given to judgments as against the debtor and his real property by the Revised Statutes.

But section 289, in respect to form of the execution, contains a provision entirely in harmony with the practice prevailing under the revised statutes.

Sub. 1 of § 289, provides that the execution "shall require the officer to satisfy *the judgment* out of the personal property of such debtor, *and if sufficient* personal property cannot be found, *out* of the real property belonging to him on the

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day when the judgment was docketed in the county, *or at any time thereafter.*"

By these last words it will be seen that no limit is placed upon the officer as to the real estate of the debtor.

These words may be considered in construing the provisions of the Code, upon the question of the right to sell after ten years from the docketing of the judgment.

These words were in the section of 1849, and it remains as it was then, unamended by the Legislature.

Then the practice was well settled that the lands of the debtor might be sold, although ten years had elapsed from the docket of the judgment (*Scott agt. Howard*, 3 Barb., 319; 7 Cowen 540; 2 Paige, 54).

The conclusion cannot be resisted that the sale and deed, carried the title of the judgment debtor, and that the execution was properly enforced out of the debtor's real estate.

The plaintiff is a purchaser in good faith, and derived a good title to the premises as against the defendants in this action, who have no color of title or equity in the premises.

The statute declares them trespassers, and this action is maintainable without any previous notice to quit (*Livingston agt. Tanner*, 14 N. Y., 64; *Torrey agt. Torrey*, 14 N. Y., 430).

There must be judgment for the plaintiff, for the recovery of the possession of the premises, with \$25 damages.

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N. Y. SUPERIOR COURT.

WILLIAM HEINMULLER, plaintiff and respondent agt. **NANCY GRAY**, Administratrix &c. of **HIRAM B. GRAY**, deceased defendant and appellant.

An action brought against defendants as *indemnitors of the sheriff*, for damages in trespass in taking and carrying away plaintiff's goods under process of the court directed against a stranger, *survives* and *continues* after the death of one of the defendants; and on the application, by motion, on the part of the plaintiff the action may be revived against the administratrix of the deceased defendant, and continued in her name.

General Term, November, 1872,

Before BARBOUR, C. J., MONELL and FREEDMAN JJ.

APPEAL from order.

The action was brought against John C. Abbott and Hiram B. Gray, as indemnitors of the sheriff, for damages in trespass in taking and carrying away plaintiff's goods under process of court directed against a stranger. After trial and verdict, judgment was entered, on June 10th, 1871, in favor of the plaintiff for \$2,481 54. On defendant's appeal to the general term the judgment was reversed and a new trial ordered with costs to abide the event. About the 27th day of January, 1872, the defendant, Hiram B. Gray, died, and Nancy Gray was appointed administratrix of the estate of the deceased, and entered upon her duties as such.

Upon the pleadings and an affidavit, showing the foregoing facts and that no new trial had been had, and no order of revivor had been made prior to the application then about to be made, the court at special term, on plaintiff's motion, made an order, that the action be revived against Nancy Gray, administratrix of Hiram B. Gray, one of the defend-

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ants, deceased, and that Nancy Gray, administratrix, &c., appear and answer the complaint herein, within eighty days from the service of a copy of this order upon her, or that, in default thereof, the plaintiff may apply to the court for an order entering her appearance, and directing the action to stand revived and continued against her, as administratrix, &c., and that the answer of said Hiram B. Gray be then deemed the answer of said administratrix.

From this order the administratrix appealed.

ABRAM WAKEMAN, *for appellant.*

STEPHEN H. BRAGUE, *for respondent.*

By the Court: FREEDMAN, J. The appellant's claim upon which her counsel rested his argument, that the order appealed from is illegal, for the reason that the action cannot be continued against her, is not well founded.

Section 121 of the Code provides, that no action shall abate by the death of a party, if the cause of action survive and continue. The legal effect of this provision, in its application to the case of the death of a defendant generally, is, that the action is not abated, but merely suspended by such death, if an action for the same cause may be maintained against the personal representatives of the deceased.

The case at bar is an action known under the old practice as an action of trespass, and although there are no provisions in the Code that either expressly, or by any reasonable intendment, give a right to maintain such an action, for such a cause, against the personal representatives of a wrong-doer, yet such right exists by virtue of the following provisions of the Revised Statutes, viz:

Title 5 of chapt. 6 and part 2d of the Rev. Stat., entitled, "Of the rights and liabilities of executors and administrators," provides, that any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate who, in his life-

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time, shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of any such person, or committed any trespass on the real estate of any such person (2 *Rev. St.*, 114 § 5; 3 *Rev. St.*, (5th *Ed.*) *pa.* 202, § 5).

And the statute concerning suits by and against executors and administrators, being the first article of title 2, chapter 8 of part 3rd of the Revised Statutes, further provides, that for wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death by his executors or administrators, against such wrong-doer, and after his death against his executors or administrators, in the same manner and with the like effect in all respects, as actions founded upon contract. (2 *Rev. Stat.*, 447, § 1; 3 *Rev. Stat.*, 5th *ed.* 746, § 1).

The second section of the last named act excepts only actions for slander, libel, assault and battery, false imprisonment, and actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator. But even these do not abate after verdict (*Code* § 121).

The authorities cited be appellant's counsel to show that the action cannot be continued, are not in point. In *Hume* agt. *Prett* (35 *Barb.*, 596); the court simply held that the rule of the common law, that in case of the death of one of several plaintiffs, who sue as tenants in common, the action can only be continued in the name of the survivors, has not been abrogated or altered by the modern legislation of this state.

In *Hopkins* agt. *Adams* (5 *Abb.*, 352), *Potter* agt. *Van Vranken* (36 *N. Y.*, 626) and *Lahy* agt. *Brady* (1 *Daly*, 443), it was held that the action for the recovery of personal property, formerly styled replevin, survives the death of the

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plaintiff, but does not survive the death of the defendant. The principle to be deduced from these decisions is, that inasmuch as the effect of a judgment in favor of the plaintiff in replevin, and in the action substituted by the Code, is to bind the defendant personally for the re-delivery of the property, no action founded upon defendant's tortious detention can be continued, after the death of such defendant, against his personal representatives. To be liable in that form of action, the tortious detention must be the result of the personal acts of such representatives.

In *People agt. Gibbs* (9 *Wend.*, 32), the declaration was in assumpsit, under 3 R. S., 513, 514, by which statute sheriffs are made liable to the people of the state, in that form of action, for neglect to return a warrant issued against a tax collector. In fact, the action was in the nature of an action on the case against the deceased sheriff's executors, for the default of the sheriff's deputy, and consequently in substance *ex delicto*. The court, after noticing 1 R. S., 311, 312, giving trespass as the *only* statutory provision passed in derogation of the common law, arrived at the conclusion that the case fell within the rule of the common law, which provided that, when the cause of action is *ex delicto* and not beneficial to the estate, no action lies against the representatives of the estate.

But in *Hopkins agt. Adams* (*supra*), the effect of the provisions of the Revised Statutes, first above referred to, was fully discussed, and this court held that, although an action in the nature of replevin did not survive the death of the defendant, an action sounding in damages only, and in which the judgment, when recovered against an executor or administrator, is to be paid out of the estate in due course of administration, does survive and may be continued against defendant's representatives.

Unless there is force in the suggestion of appellant's counsel, that that doctrine is to be strictly confined to the case of the death of a *sole* wrongdoer, and that it cannot be extended

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to a case of the death of one of several wrongdoers, and that in the latter case, such death can only be suggested on the record, and the action can only proceed against the surviving defendant, under 2 *Rev. Stat.*, 386, sec. 1, we see no reason why we should apply a different rule to the case now before us.

If the action were founded upon the joint liability of the original defendants, arising out of a contract, express or implied, the position of appellant's counsel would be correct. In such case the action, by virtue of the statute last referred to, would survive against the surviving defendant, and no action would lie against the appellant in her representative capacity, except upon proof of the insolvency of the surviving defendant, and that plaintiff had exhausted his remedy against him (*Voorhis* agt. *Child's Execrs.*, 17 N. Y., 354; *Fine* agt. *Righter*, 3 Abb., N. S., 385). But this rule applies neither to parties severally liable for a debt by express contract, nor to parties jointly and severally liable as wrongdoers.

The original defendants in this case were sued as joint tortfeasors, and as such their liability is joint and several. If they had been sued separately, an answer by one pleading a former recovery against the other, would not have been good, unless it also averred actual satisfaction. It is true that, being sued jointly, the action, upon the death of either, becomes incapable of being continued as a joint action against the survivor and the representatives of the deceased. But there can be no doubt that the action, if severed by the death of one, survives against the other, and that under section 274 of the Code, it may be continued against the representatives of the deceased as a separate action, as was suggested in *Gardner* agt. *Walker* (22 How., 405); *Union Bank* agt. *Mott* (27 N. Y., 633); and *McVean* agt. *Scott*, *Adm.*, (46 Barb., 379).

The action, therefore, was rightfully continued against the appellant, and, no question having been raised as to the form

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of the order, as entered, the order appealed from must be affirmed. In order to be in a position to try the case against the appellant as a separate action, it may perhaps become necessary for the plaintiff to make a further application. But as that question is not properly before us, we express no opinion upon it.

Order affirmed with costs

BARBOUR *C. J.* and MONELL *J.* concurred.

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SUPREME COURT.

DENIS QUIN agt. THE MAYOR, ALDERMEN AND COMMONALTY of the City of New York.

In an action against the *corporation of the City of New York* by a justice of a district court of that city for payment of a balance of salary claimed to be due the justice, at the rate of \$10,000 per year, and the answer of the defendants deny that the salary of the plaintiff was fixed at \$10,000 per year, but allege that it was fixed by law at \$5,000 per year, and offer to allow judgment at the latter rate; On demurrer to the answer, the question is, whether the salary of the plaintiff was lawfully fixed at \$10,000, per year or at the lesser sum of \$5,000.

This question is settled in favor of the plaintiff by showing that on the 31st of December, 1869, the common council passed an ordinance fixing the compensation of each of the *police justices* at \$10,000 per year, and that compensation was thereafter paid to them at that rate, and was so paid when *ch. 383 of the Laws of 1870* was enacted.

The latter enactment reads as follows "The: mayor and comptroller are hereby authorized to fix the salaries of the civil justices of the city of New York, or any or either of them, as they may deem the legal business of the respective districts to justify, not exceeding the salary now paid to the police justices of said city.

It is in vain to assert that the salary of the police justices had been unlawfully fixed at \$10,000 per year. That is not the question; but rather what was the sum then paid as such salary.

On the 21st of October, 1870, the mayor and comptroller in pursuance of the act of 1870 *ch.*, 383, fixed the salary of the plaintiff as such civil justice at \$10,000 per year, and signed a certificate to authenticate such action. To this salary the plaintiff is entitled.

The second defense set up in the answer was that there was not money in the treasury of the city appropriated or applicable to the plaintiffs claim at the rate of \$10,000 per year.

The defendants rely upon *ch. 583 of the laws of 1871*, as supporting this defense. It is claimed that this act, commonly called the "two per cent act," limits the amount to be raised by the board of supervisors, by taxation for the year 1871, and that the board of apportionment, after providing for the principal and interest of certain bonds and the city's proportion of the state tax, shall apportion the remainder of such aggregate amount "to the various departments and purposes of the city and county governments" and that from the sum so raised, all the expenses of the city and county for all their departments and purposes shall be paid, and no liabilities shall be incurred for any purpose in excess of such amount (§ 1-3).

That by said act the board of apportionment has power to regulate the salaries of officers and employees of the city and county governments (§ 3).

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Also the 5th section of the same act is relied on which provides that "*no liability for any purpose whatsoever shall thereafter be incurred by any department of the city of New York or officers of the county of New York exceeding in amount the appropriation made for such purpose; nor shall the City and County of New York be held liable for any indebtedness so incurred.*"

Held, 1st. that the civil justices are not attached to any of the "departments" of the city government; nor are they officers or employees of any of those departments, but still these civil justices are entitled by law to have their salaries paid by the city.

2d. When *ch.* 583 of the laws of 1871 was passed the salaries of these civil justices were fixed at \$10,000 each per year, and if when the board of apportionment had made the appropriations thereunder for 1871, whether they exhausted all the fund at their disposal or not, they had allowed to the civil justices for their salaries but one-half of what they were entitled to receive, then it is clear that one-half the sums due the justices for their salaries would still be due to them above such appropriations. The act of 1871, was not intended to abrogate existing lawful contracts, or liabilities of the city.

3rd. The city is liable for the plaintiff's salary at the rate of \$10,000 per year, though the board of apportionment has failed to provide for its payment.

New York Special Term, December, 1872.

THE plaintiff was elected justice of the first district court of the city of New York, and entered upon his six years term of office January 1st, 1870. His salary was fixed by the Mayor and Comptroller at \$10,000 per annum and was paid at that rate up to September, 1871. Subsequent to that date the plaintiff's salary was paid at the rate of \$5,000 per annum, and this action was brought to recover the balance due.

The answer of the defendants, verified by Andrew H. Green, comptroller of the city of New York, denies that the salary of plaintiff was fixed at the rate of \$10,000 per annum, and alleged as a second defense that there was no money in the city treasury appropriated or applicable to the payment of plaintiff's salary at the rate of \$10,000 per annum.

The answer did not deny any of the material facts set out in the complaint. The plaintiff demurred on the ground that the facts stated in the answer are not sufficient to constitute a defense.

The facts are very fully stated in the opinion of the judge.

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A. R. LAWRENCE, *for plaintiff.*

D. J. DEAN, *for defendants.*

FANCHER, J.—The plaintiff, at the charter election in December, 1869, was elected to the office of justice of the district court in the city of New York, for the first judicial district of said city, for the term of six years from the first of January, 1870, and he entered upon the duties of the office on that day and has since then continued to perform the same.

This action is brought to recover for the salary of the plaintiff, as such civil justice, from the first of September, 1871, to the 31st day of May, 1872, at the rate of \$10,000 per annum. The first and second demands of payment, required by law, were made upon the comptroller, and he refused to pay the claim.

The answer of the defendants, verified by the comptroller, as chief financial officer of the city, denies that the salary of the plaintiff is at the rate of \$10,000 per annum; alleges that it is fixed by law at \$5,000 per annum, and offers to allow judgment at the latter rate. For a second defense the answer alleges that there is no money in the treasury of the city appropriated, or applicable, to the payment of the salary at the rate of \$10,000 per annum; and finally sets up that on and since the first of October, 1871, there was no money in the treasury so appropriated or applicable.

To this answer the plaintiff has demurred, and the question is whether the answer states any lawful defense to the action.

1. The first question which arises on these pleadings is whether the salary of the plaintiff is lawfully fixed at ten thousand dollars per annum, or at the lesser sum of five thousand dollars per annum. *Chap. 308 of the laws of 1864* provides, that the justices and clerks of the district courts should receive an annual compensation to be fixed by the board of supervisors. The complaint sets forth this provi-

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sion of law, and alleges that on the 31st day of December, 1864, an ordinance or resolution was adopted by the board of supervisors, and approved on the same day by the mayor, fixing the compensation of the said justices at \$5,000 per annum, payable monthly. The complaint sets forth the provisions of law, which authorize the common council or board of supervisors to increase the compensation of certain officers including police justices; and alleges that on the 31st of December, 1869, the common council passed an ordinance fixing the compensation of each of the police justices at \$10,000 per annum; and that compensation was thereafter paid to them at that rate, and was so paid when *chap. 383 of the laws of 1870*, was enacted.

The last enactment reads as follows:

“The mayor and comptroller are hereby authorized to fix the salaries of the civil justices of the city of New York, or any or either of them, as they may deem the legal business of the respective districts to justify, *not exceeding the salary now paid to the police justices of said city.*”

It is conceded that the salary then paid to each police justice, under the color of the authority of law, and within the literal scope of the language of the legislature and of the common council, was \$10,000 per annum; but it is contended that the common council had no lawful authority to increase such salary to that sum.

Whether the ordinance of the common council of the 31st December, 1869, by which the compensation of each of the police justices was fixed at \$10,000 per annum, was legal and valid, or not, it is certain that it was adopted under the supposed authority of law. *Chap. 508 of the laws of 1860*, contains the supposed authority and provides that “the common council or the board of supervisors in said city and county may increase the compensation of any officer mentioned herein,” and police justices are officers mentioned in the act.

When this plaintiff entered upon the duties of his office

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the salary of a police justice, as fixed by resolution of the common council, and as paid, was \$10,000 per annum, and this was the specified salary paid to a police justice when, in April following, *chap. 383 of the laws of 1870* was passed. Now when the legislature by that act declared that the mayor and comptroller are thereby authorized to fix the salaries of the civil justices of the city of New York or any or either of them, as they may deem the legal business of the respective districts to justify, not exceeding the salary then paid to the police justices of said city, what did the legislature mean? It is plain they meant to grant to the mayor and comptroller a discretion to fix such salary at any sum not exceeding the sum *then paid* as salary to a police justice. It is in vain to assert that the salary of the police justice had been unlawfully fixed at \$10,000 per annum. That is not the question; but rather what was the sum *then paid* as such salary? Unquestionably the sum was ten thousand dollars per annum, and, right or wrong, it was being paid under color of the authority of law. The act of 1870 does not refer to any law fixing the salary of a police justice, nor does it contain any language by which the act can be construed to mean the lawfully fixed salary of the police justice. On the contrary the expression of the statute is, "not exceeding the salary *now paid* to the police justices of said city."

On the 21st of October, 1870, the mayor and comptroller of the city in pursuance of the authority of *chap. 383 of the laws of 1870*, fixed the salary of the plaintiff, as such civil justice at \$10,000 per annum, and signed a certificate to authenticate such action. They must, at that time, have supposed that their official act was valid and in accordance with law, and I can see no reason to suppose that it was not legal and valid.

It is said that when the common council, on the 31st of December, 1869, increased the salary of a police justice from \$5,000 to 10,000, they acted in violation of law,

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because *chap. 876 of the laws of 1869*, which was then in force, prohibited the common council from creating any new office or department, or increasing the salaries of officials then in office.

Suppose this objection as to the want of power of the common council to increase the salary of a police justice to be well taken. Does it overthrow the fact that the common council did pass an ordinance to increase such salary to \$10,000 per annum, under which it *was paid* at that rate? The fact is, such an ordinance was passed, and from that time to the passage of the act of 1870, and the granting of the certificate of the mayor and comptroller above mentioned, the sum *then paid* as salary to the police justice was \$10,000.

Whether the police justice got his salary lawfully or unlawfully, the amount then *paid him* therefore, under color of lawful authority, was \$10,000 per annum. This *sum*, then, is the standard up to which the mayor and comptroller had a right, under the act of 1870, to go, when they fixed the salary to be paid to the civil justices of the city. This standard was the limit beyond which they had no discretion, and since they have not exceeded it, I think their action was legal. When courts are construing a statute with a view to its proper interpretation, the chief thing sought for is the thought expressed by the language of the statute. (*Newell agt. The People*, 7 Y. N., 97). It is clear that the thought expressed by the language of the act of 1870 is, a graduation of the salaries of the civil justices according to the discretion of the mayor and the comptroller, up to, but not above, the standard which was marked by the sum then paid for salary to a police justice. The idea that such sum was illegally fixed, could not, when the act of 1870 was passed, have entered the mind of the legislature, for the point had not been raised. If the salary of a civil justice in New York is not fixed at the proper amount, the remedy must be sought in the proper place, and not in the court which

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cannot make law, but is only authorized to interpret and administer it.

2. The second defense set up by the answer is, that there is not money in the treasury of the city appropriated or applicable to the plaintiff's claim at the rate of \$10,000 per annum.

Chapter 583 of Laws of 1871, p. 1268, is relied upon as supporting this defense. It is claimed that this act, commonly called the "two per cent." act, limits the amount to be raised by the board of supervisors, by taxation, for the year 1871, and that the board of apportionment, after providing for the principal and interest of certain bonds, and the city's proportion of the state tax, shall apportion the remainder of such aggregate amount "to the various departments and purposes of the city and county governments"; and that from the sum so raised "all the expenses of the city and county for all their departments and purposes shall be paid, and no liabilities shall be incurred for any purpose in excess of such amount (Sec 1-3).

It is further claimed that by said act the board of apportionment has power "to regulate the salaries of officers and employees of the city and county governments (Sec. 3).

The 5th section of the same act is relied on, which provides that "no liability for any purpose whatsoever shall thereafter be incurred by any department of the city of New York, or officers of the county of New York, exceeding in amount the appropriations made for such purpose; nor shall the city or county of New York be held liable for any indebtedness so incurred.

The civil justices are not attached to any of the "departments" of the city government, nor are they officers or employees of any of those "departments." This will be evident by a reference to the Charter of 1870, (1 *Laws of 1870, p. 366 chap. 137*), which defines what are the coordinate departments of the city government, and how they are constituted. The civil justices are elected by the elect-

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ors of the district in the manner prescribed by law. (*Laws of 1857, chap. 344, 707, § 5; Laws of 1865, 1898, chap. 688, § 8*). But although not attached to any of the "departments" of the city government, still the justices of the district courts, in the city of New York, are entitled by law to have their salaries paid by the city. This is not disputed. When, therefore, the board of apportionment met to dispose of the moneys raised under the "two per cent" act, they well knew that the salaries of the district court justices were to be provided for. Those salaries were then legally fixed at \$10,000 each—at least the salary of the plaintiff was fixed at that sum. It is not asserted that out of the sum capable of being apportioned, provision could not have been made for the payment of these salaries and for all other purposes of the city and county government, by the board of apportionment, nor that to have done so would have required the board of apportionment to exceed the expenditure allowed by law. It is only asserted that the board of apportionment did not, under the act of 1871, appropriate or make applicable to the payment of the plaintiff's salary any sum above \$5,000. per annum. If this be so, the board has provided for half of the salary of the plaintiff accruing during 1871, and left the other half unprovided for. What are the plaintiff's rights under that state of facts?

It is contended for the defendants, that by virtue of the statute, (*chap. 583, Laws of 1871, § 5*), no expense can be incurred for 1871, in excess of the appropriations made by the board of apportionment; that neither the city or county of New York can be held liable for any such excess of indebtedness so incurred; that no legal claim, therefore, can exist for salary or other expense incurred in excess of the appropriation (*Donovan agt. The Mayor, &c. (33 N. Y., 291)*); and that no judgment can be recovered in such case unless it appears that there is money in the city treasury applicable to the payment of the claim (§ 6 of *chap. 586*,

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Laws of 1867; Tribune Association agt. The Mayor, &c., 48 Barb., 240).

If, as we have seen in the case, when *chap. 583 of the Laws of 1871* was passed, the salaries of the justices of the district courts of the city were fixed at \$10,000 each per annum, and if, when the board of apportionment had made the appropriations thereunder for 1871, whether they exhausted all the fund at their disposal or not, they had allowed to the district court justices, for their salaries, but one-half of what they were entitled to receive, then it is clear that one-half the sums due the justices for their salaries would still be due to them above such appropriations. Can the city escape liability therefor under shelter of the act of 1871? Was that act intended to abrogate existing lawful contracts or liabilities of the city? It should not be construed to have such an effect unless it be necessary, and, I think, no such necessity exists. Suppose that in January, 1871, prior to the act, a contract had been duly made by the city with a timber dealer for supplying, during that year, a specified amount of certain timber, for repairing docks, or other lawful use, and that the contractor, faithful to the contract, had delivered all the timber during the year, and thus performed the contract on his part, but from some omission or design the board of apportionment had not appropriated sufficient moneys, according to the "two per cent" act, to pay for the timber, though the city received and used it all. Can it be pretended that the effect of the act is to deprive the contractor of his due, and that no "legal claim" could exist against the city therefor. If such is the effect of a proper interpretation of the act, it does not require argument to show that it is unconstitutional and void, I think the act is not obnoxious to such an interpretation. A more reasonable construction is possible. The act is prospective, and its provisions are not to have a retroactive effect. Whatever valid contracts or liabilities of the city existed at the date of its passage continue to exist, and are not abrogated by the act.

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The language of the act of 1871, § 5, is, "no liability for any purpose whatever shall be hereafter incurred by any department of the city of New York, or officers of the county of New York, exceeding in amount the appropriations made for such purpose." The plaintiff's claim is not a liability incurred by any "department" of the city, nor by any officer of the county, nor was it incurred after the act. On the contrary, it is a liability imposed on the city by the people in their sovereign capacity, through the act of the legislature, which requires the city to pay the salaries of the district court justices, and the liability was incurred before the act of 1871, and when the plaintiff assumed his office.

It may be true, that in respect of expenses for purposes of city or county government, incurred after the passage of the act, no liability therefor could be incurred by the city in excess of the amounts appropriated by the board of apportionment. After the act was passed, parties contracting with the city were advised of the provisions of the act, and could refrain from contracting so as to protect their rights; but parties who had been bound by contract, or by election and oath of office, prior to that time, could have no such advice or opportunity, and they would be entrapped and defrauded if the act be held to be retrospective and applicable to them. The plaintiff entered upon his office prior to the passage of the "two per cent." act; he took his oath of office prior to that time; and when the act was enacted, he was bound in law and conscience to continue to perform the duties of his office for the term for which he was elected, and he could not withdraw from the obligations. Neither law nor justice will, I think, permit the city to withdraw from its correlative obligation imposed upon it by law. It is liable for the plaintiff's salary at the rate of \$10,000 per year, though the board of apportionment has failed to provide for its payment.

The case of *Donovan agt. Mayor of New York*, (33 N. Y., 291), cited by defendant's counsel, held that where municipi-

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pal officers act without authority in making a contract, the city will not be liable. Of course, if a party act in contravention of the policy and terms of a statute, he cannot invoke the aid of the courts to enforce an unlawful agreement. But what has this plaintiff done in contravention of any law? or what illegal duty has he undertaken? His office and duty as district justice are precisely within the express terms of law, and the principle of the case in 33 N. Y. does not seem to me to be applicable to him. He would have been guilty of violation of both law and duty had he refrained from exercising the functions of his office. Nor does the case of the *Tribune Association agt. The Mayor, &c., of New York* (48 Barb., 240), affect the right of this plaintiff to recover for his salary. Under the statute of 1866, vol. 2, 2070, § 10, the general term of the first department held, that no judgment in actions upon contract could be entered by default or otherwise against the corporation of New York except upon proof in open court that the amount sought to be recovered remained unexpended in the city treasury to the credit of the appropriations to the specific object or purpose upon which the claim sued for is founded, and that the statute affected the remedy and not the contract, forasmuch as it prohibited the entry of a judgment until the appropriation was made. The court said the act "is not applicable to actions but to judgments."

An examination of the provisions cited from the 10th section of the act of 1866, with the entire control of the section, and with the other sections of that act, will show that the restriction as to the entry of judgments against the city, contained therein, is applicable only to the liabilities of 1866, and respects only the appropriations made under that act for the liabilities of that year. The consequences of holding that all of the liabilities for all time against the city shall not exceed the sum appropriated by that act for the purpose would be so absurd that no one will be found to contend that the restriction against rendering judgments ap-

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plies to any claims or liabilities except those of the year of 1866. This construction is favored by the express language of the similar act of the succeeding year (2 *Laws of* 1867, 1606, § 6), which, in express terms, limits the restriction as to the entry of judgments by default or otherwise against the corporation of New York to that particular year and it is not extended to judgments generally.

But it is argued that *chap. 583 of the act of 1871, § 3*, authorizes the board of apportionment to regulate all salaries of officers and employees of the city and county governments, and forasmuch as the board have only appropriated money to pay the salaries of the district court justices, for 1871, at the rate of \$5,000 per annum, therefore those salaries are thus lawfully regulated. It may be questioned whether the officers thus referred to, include judicial officers. The term certainly does not include state officers who derive their office from the general laws of the state, and whose duties are not by law limited to the city and county of New York. Yet resuming that the language just quoted is broad enough to embrace district court justices, whose salaries are paid by the city, there is this sufficient answer to the argument, that the salaries have been charged by the board of apportionment. The act of the board of apportionment in setting apart or appropriating a certain sum for the payment of the salaries of the district court justices for 1871, which sum thus appropriated is less than the aggregate amount of such salaries as lawfully fixed, is not a regulation of such salaries so as to change the amounts of the salaries as already fixed. Before the board of apportionment can change the amount of a specific salary they must act directly on the question of the amount of the salary, and explicitly make the change.

The change, or regulation of the salary to a different sum, will not be inferred from the indirect action of the board in setting apart an aggregate amount to meet the payment of

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the same and similar salaries. It does not appear but that other moneys were at the command of the board which could be appropriated to the purpose, nor that the board intended to make no further appropriations for this purpose.

They have the express power by the 3d section of *chap. 583 of the act of 1871* (as the comptroller has by *chap. 9 of Laws of 1872*), to "transfer appropriations which are found to be in excess of the amount required or deemed to be necessary to such other purposes as they shall find to require the same. The language implies that some of the appropriations made would be insufficient for the purposes for which they were made, and is potential in argument to show that an appropriation unequal to the purpose of paying certain fixed salaries was not a regulation or reduction of the salaries to the standard of the first appropriation. If there is not money in the city treasury sufficient to meet the payment of these salaries, it is not the fault of the law. There is sufficient lawful authority to raise the amount necessary under *chap. 583 of the Laws of 1871, and chaps. 9, 29 and 444 of the Laws of 1872*. The board of apportionment and audit can provide for the claims, and until the revenues from taxation are received the comptroller can issue bonds to cover all the deficiencies in respect of these salaries and the salaries of any judicial officers. It is not competent for the financial department of the city to say, "there is no money in the treasury to meet the claim," when the financial department and the board of apportionment and audit themselves might supply the deficiency. The claim is lawful and honest; there is abundant, lawful power to raise the money to provide for it; and if the board of apportionment and audit, and the comptroller, refuse or neglect to take the proper action to make such provision, then the remedy of the plaintiff is to establish his claim by a judgment and to collect it by an execution.

It is contended that because the legislature, by *chap. 9*

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of the laws of 1872, provided for a board of apportionment and audit, and gave to the board power to make an estimate of the amounts required to defray the expenses of conducting the public business of the city and county of New York for 1872, the plaintiff should file his claim with such board. When that board made their estimate for the year 1872 they should have included the plaintiff's salary with the amount required to pay the salaries of other judicial officers, Under *chap. 29 and 444 of the Laws of 1872*, they could have made new estimates. It appears, from the answer, that the board has failed of its duty in this particular. The answer makes out that an amount is in the treasury sufficient to pay the plaintiff's salary at the rate of \$5,000 per annum, and not more. Is the city to escape its liability, or the plaintiff to lose his salary, because of this failure of the board of apportionment and audit? No such consequences should follow. If the board will not do what justice and law require, and what it might do to pay the just claims against the city, then the city must not only respond to its just liability, but be subject to the costs of a litigation it should have avoided.

Chapter 9 of the laws of 1872 declares that "it shall be the duty of such departments and officers (that is the departments of the city and the officers of the county of New York), to regulate expenditures so that they shall not exceed the appropriations made by said board for the period aforesaid, and no liability for any purpose whatever shall, during the period aforesaid, be incurred by any officer or department within said city and county beyond the appropriations so made."

As already remarked, the district court justices of the city are not attached to any of the "departments of the city, nor is the salary due to one of them, already fixed by competent authority according to law, before the passage of the act, a liability incurred by him. In other words, the salary of a

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district court justice, lawfully fixed before 1872, which may fall due for and during that year, is not a liability incurred by that officer against the prohibition of the law of 1872.

I do not think any lawful defense to the plaintiff's claim is set forth in the answer in this action, and judgment should be ordered against the defendants, for the amount of his claim, with costs, and five per cent. allowance.

Judgment is ordered accordingly.

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N. Y. SUPERIOR COURT.

MONTGOMERY QUEEN, plaintiff and appellant agt. THE SECOND AVENUE RAILROAD Co., defendant and respondent.

The plaintiff on one side and a majority of the executive committee of the defendant's railroad on the other side, agreed, among other things that the plaintiff, except for a good and sufficient cause shown for his removal, should have the permanent and supreme control in the management of the company's road and interests, at a salary of \$6,000 per year, and an increase thereof in proportion to a certain increase of the company's profits. That thereupon, March 2d, 1869, plaintiff was elected a director of the company :

That at the annual meeting of stockholders held April 5th, 1869, he was elected a director for a full term, and that at a meeting of the board of directors held the next day he was elected vice-president of the company, and thereupon the following resolution was passed by the board :

"Resolved that the vice-president perform the duties of general superintendent of the road, (one of the elective officers of the company) with the right to employ the former superintendent or such other person as he may see fit in his place to assist him until the further action of the board, and the salary of the vice-president be \$6,000 per annum."

It appeared that on the day of the passage of that resolution, to wit, April 6th, 1869, plaintiff assumed the management of the road, and that he continued in such management and in the receipt of a salary at the rate of \$6,000 per annum, until July 6th, 1870, when he was removed from such management, and also from the vice-presidency, by a vote of the board of directors without any cause being assigned for such removal.

Held, that the arrangement between the executive committee and the plaintiff was a contract not binding upon the defendant. The executive committee had no power from the charter, or by-laws to make such a contract personally or as an executive committee. Besides so far as the passage of said resolution of April 6th, 1869, and plaintiff's acquiescence therein constituted a new contract, it was one that was inconsistent with the prior arrangement entered into between plaintiff and the executive committee. Being inconsistent, such new contract became, at least to the extent of its inconsistency, a substitute for the prior arrangement.

Therefore, under the resolution of April 6th, 1869, the plaintiff was an officer of the company, and that his term of office was subject to the fifth section of the by-laws and consequently terminable at the pleasure of the board, and his claim under the arrangement made with the executive committee for a portion of his salary claimed upon the second year was not sustainable.

General Term, November, 1872.

Queen agt. Second Avenue R. R. Co.

Before BARBOUR, C. J., MONELL and FREEDMAN, JJ.
APPEAL from judgment.

IRA SHAFER, *for appellant.*

JOHN E. BURRILL, *for respondent.*

By the Court, FREEDMAN, J.—This is an appeal from a judgment entered in favor of the defendant against the plaintiff on a dismissal of the complaint on the trial.

The motion to dismiss was made upon the pleadings, the admissions made by plaintiff's counsel in his opening to the jury, and upon documentary evidence read by the counsel for the respective parties in the course of their arguments.

From these sources it was made to appear that the plaintiff, in the month of December, 1868, was requested by the officers of the defendant to investigate into and ascertain the condition and affairs of defendant's road; that he was a man noted for his successful management of horse-railroads; that he made such investigation and reported the result thereof.

That thereupon, in February or March, 1869, an arrangement was entered into between plaintiff on the one side and Mr. Wadsworth, the president, and Mr. Kent, one of the directors of the road, who, together, constituted a majority of the executive committee of the road on the other side, whereby it was agreed, among other things, that the plaintiff, except for a good and sufficient cause shown for his removal, should have the permanent and supreme control in the management of the company's road and interests at a salary of six thousand dollars per year, and an increase thereof in proportion to a certain increase of the company's profits. That thereupon, to wit, March 2d, 1869, plaintiff was elected a director of the company to fill a vacancy then existing; that at the annual meeting of the stockholders held April 5, 1869, he was elected a director for a full term, and that at a meeting of the board of directors held the

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next day, he was elected vice-president of the company. The by-laws under which such elections were had contained the following provisions :

Section 4 provided that the principal officers of the company should be a president, a vice-president, a treasurer, a secretary, and a superintendent.

Section 5 provided that the president, vice-president, treasurer, secretary, and superintendent of the company should be annually elected, and should hold their offices at the pleasure of the board of directors, and until their successors should be duly chosen, unless sooner removed by the board.

Section 10 of the by-laws was in these words : " There shall be a vice-president, who shall perform the duties of the president, in case of his absence or inability to act, and if that office be vacant he shall act as president until a successor in said office is chosen."

Section 13 of the by-laws, also read in evidence, provided that the superintendent should have, subject to the direction of the president, the special superintendence of the track and cars, and the repairs and running of the road, and a general supervision of the depot, stables, and work-shops, and over all the conductors, starters, drivers, hostlers, mechanics and laborers in the company's employ, it also imposed upon him other duties and powers necessary to carry out what evidently were the main objects of the office.

It further appeared that the arrangement which had been entered into between Mr. Wadsworth, Mr. Kent, and the plaintiff, was imparted to the board of directors at the same meeting at which plaintiff was elected vice-president, and that thereupon, the following resolution was passed by the board, viz. :

" Resolved, That the vice-president perform the duties of general superintendent of the road, with the right to employ Mr. John W. Smith, the former superintendent, or such other person as he may see fit in his place to assist him, until the

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further action of the board, and the salary of the vice-president be six thousand dollars per annum."

It also appeared that on the day of the passage of that resolution, to wit, April 6th, 1869, plaintiff assumed the management of the road, and that he continued in such management and in the receipt of a salary at the rate of six thousand dollars per annum, until July 6, 1870, when he was removed from such management and also from the vice-presidency by a vote of the board of directors without any cause being assigned for such removal.

Upon this state of facts, plaintiff's counsel conceded that if the original arrangement as to plaintiff's employment was for a longer time than one year, it was void under the statute of frauds. But he claimed that it was a good contract for a year at all events, and being good for that period, and plaintiff having gone on under it not only for that length of time, but also for part of another year, the presumption of law is, that the second year was upon the same terms as the first, and that defendant was bound to keep him during the whole of the second year, unless there was cause for his discharge.

The said counsel also conceded that according to the strict language of section 5 of the by-laws, the board of directors possessed the power to remove any officer of the company with or without cause, and that if the plaintiff occupied simply the character of vice-president, if his relation to the company was simply that of vice-president, the board had the right, power and authority to remove him at any moment with or without cause. But he claimed that the plaintiff, when he assumed control, did it as manager and superintendent entirely aside from his office and character as vice-president, and that he was simply clothed with the character and authority of that officer for the purpose of being more effectually enabled to carry out his general plans as managing superintendent.

The said counsel finally conceded that if the resolution of the 6th of April, 1869, cut off all prior negotiations, and

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plaintiff's action were based on that resolution, the plaintiff would be compelled to stand or fall in his character as vice-president or superintendent. But he insisted that the said resolution was consistent with the prior arrangement, and passed in furtherance thereof; that the said prior arrangement constituted the real contract between plaintiff and defendant, and that as such a contract, to run for not more than one year, was not required by any statute or rule of law to be in writing, it could be proved by parol evidence, and should be construed with reference to the resolution and the intent of the parties who made it, and should, at least, be submitted to the jury as a question of fact. In this view of the case, it was claimed that plaintiff had an unquestionable right to go to the jury as to his right to recover the balance of his salary for the second year, amounting to \$4,500.

This view, however, rests wholly upon the assumption that the arrangement between Mr. Wadsworth, Mr. Kent, and the plaintiff, was a contract binding upon the defendant, an assumption which further investigation shows to be wholly without foundation.

The defendant is a corporation, and, as such, is incapable of doing any act except through agents. The acts of such agents, in order to be binding upon the corporation, must either be done in the line of such agency and within the limits of authority conferred on them, or be ratified by the corporation. It is one of the fundamental conditions into which the corporators enter by becoming members of the corporation; that the corporate concerns shall be managed in the manner prescribed by the act of incorporation and the by-laws enacted in accordance therewith. The duties and powers of such officers or agents as the corporation may, by its by-laws recognize, are generally regulated by such by-laws. And as there is no grant of power in the mere name by which any such officer or agent may be designated, all persons dealing with him are chargable with notice of his

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authority and of the limitations and restrictions upon it contained in the act of incorporation and by-laws.

Now the arrangement claimed by plaintiff to have been entered into between himself, Mr. Wadsworth, and Mr. Kent, was, that he the said plaintiff, except for a good and sufficient cause shown for his removal, should have the permanent and supreme control in the management of said company's road and interests. That the making of such a contract was beyond the scope of the authority of Mr. Wadsworth as president, and even beyond the powers of the executive committee, was shown by those sections of the by-laws which defined and prescribed the powers and duties of the president, the superintendent and the executive committee. A fair and impartial interpretation of these sections admits of no other conclusion. Indeed, it may well be doubted, whether the entire board of directors or even the corporation itself, could have invested the plaintiff with such permanent and supreme control as the literal reading of plaintiff's statement of the original arrangement calls for, and which, if conferred, would have worked, in the one case, an abdication, and in the other, an abolition of the board of directors. Even if we assume, therefore, that the said original arrangement amounted to a contract between the executive committee and the plaintiff, such contract, under that section of the by-laws, which required the executive committee to keep regular minutes to be submitted to the board of directors for approval at the next meeting of the board, could only have been an *ad interim* contract made subject to the ratification of the board, and which was liable to be modified or superceded by the action of the board.

And when, therefore, we find, that the matter was on the 6th of April, 1869, laid before the board, of which plaintiff was a member, and that the board acted upon it by the passage of the resolution referred to,—when we find, that up to the passage of that resolution the powers and duties

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of vice-president and of superintendent had been entirely different and distinct; that the office of vice-president, except in case of the inability of the president to perform his functions, had so far been a comparatively unimportant one, while the powers and duties of the superintendent had been those of an active manager and had included, among other things, subject only to the supervisory power of the president, the special superintendence of the track and cars, and the repairs and running of the road, and a general supervision of the depot, stables and workshops, and over all the conductors, starters, drivers, hostlers, mechanics and laborers in the company's employ,—when we find, that by the resolution referred to, the said powers and duties of the superintendent were transferred to the plaintiff as vice-president, and in consideration thereof a salary of six thousand dollars attached to the office of vice-president,—and when, in addition to all this, we find that the plaintiff, who by that time had been a director for five weeks and presumptively was fully conversant with the by-laws, did not object upon the ground of the incomprehensiveness or insufficiency of the resolution, or in any wise question the determination made by the board, but that, on the contrary, he thereupon entered upon the discharge of the powers and duties imposed upon him by said resolution and the by-laws, and for the salary fixed by the same resolution, continued so to perform duty for a period of fifteen months without objection or question,—we can come to no other conclusion than that plaintiff acquiesced in the action of the board of the directors, and that, so far as the passage of said resolution and plaintiff's acquiescence therein constituted a new contract, it was one, that was inconsistent with the prior arrangement entered into between plaintiff and the executive committee. Being inconsistent, such new contract became, at least to the extent of its inconsistency, a substitute for the prior arrangement. From this it follows, that the learned

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judge below correctly held, that under the resolution of April 6th, 1869, plaintiff was an officer of the company, and that his tenure of office was subject to the fifth section of the by-laws, and consequently terminable at the pleasure of the board.

The complaint was properly dismissed, and the judgment appealed from must be affirmed with costs.

BARBOUR, *C. J.*, and MONELL, *J.* concurred.

Merrill agt. Pattison.

SUPREME COURT.

WILLIAM R. MERRILL, respondent, agt. SAMUEL PATTISON,
appellant.

A re-trial may be had in all cases brought into the county courts, by appeal, without reference to the form of the action, when the claim or claims for judgment made by the pleadings of either party shall exceed the sum of fifty dollars. And also in actions for the recovery of specific personal property, where no claim or claims exceeding that amount may be made, provided the damages actually recovered, added to the assessed value of the property, shall exceed that sum.

Erie General Term, February, 1870.

MARVIN, P. J., BARKER and DANIELS, JJ.

THIS action was originally commenced in a court of justice of the peace, in Chautauqua county, for the recovery of the possession of one buck sheep, claimed to be wrongfully detained by the defendant from the plaintiff, and damages for the detention of the same. The complaint alleged the sheep to be of the value of twenty dollars, and demanded judgment for its return, with one hundred dollars damages for its wrongful detention. The defendant, by his answer, denied each and every allegation contained in the complaint. At the time of the commencement of the suit, the sheep was taken from the possession of the defendant by virtue of the undertaking, affidavit and indorsement of the justice, provided for by the Code. The action was tried on the return day of the summons, and the plaintiff had judgment awarding to him the possession of the property, with \$12 damages, for its detention by the defendant, and five dollars costs. The defendant appealed from the judgment to the county court of Chautauqua county, and that court refused to

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allow the cause to be there re-tried, and affirmed the judgment of the justice. From the order then made, and the judgment pronounced by that court, the defendant appealed to this court.

JULIUS A. PARSONS, *for appellant.*

SHERMAN & SCOTT, *for respondent.*

By the Court, DANIELS, J.—As the evidence given on the trial of the cause before the justice was not returned, and is not contained in the case on which the appeal was heard in this court, no ground is disclosed on which this court can pronounce either the judgment of the justice or that of the county court erroneous upon the merits. If any presumption is to be entertained on that subject, it is that both those judgments were given according to law. For evidence is never to be presumed, its existence must always be shown by the party insisting upon it. The only question, therefore, which is presented by the present appeal, is whether the county court erroneously refused to allow the cause to be re-tried before that tribunal.

No substantial change seems to have been made in the law which can affect the decision of this question since jurisdiction was first conferred upon justices of the peace over actions for the recovery of the possession of personal property. (*Laws of 1860, 209; Laws of 1862, 853, § 23*). By the act last referred to, the new trial in the county court was provided: for two classes of cases. First: Where the claim or claims for which judgment may be demanded by either party in his pleadings shall exceed fifty dollars. Second: When in an action to recover the possession of personal property, the value of the property as assessed, and the damages recovered shall exceed fifty dollars (*Code, § 352*). The first of these provisions is as comprehensive as it could well be made by language. The terms made use of for the purpose of indicating the right of the appealing party to a new

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trial in the county court, are of the most general nature. That right is made solely dependent upon the claim or claims made by either party in his pleadings. Wherever a claim exceeding fifty dollars may be made in an action for the recovery of specific personal property as in any other form of action known to the law. Wherever such a claim may be made, the right to the new trial under the general provision must be determined by that circumstance.

If that were not the construction required by this provision, the defeated party would be deprived of the right to try the action in the county court, where the property itself might exceed the value of fifty dollars, if no assessment of the value were made in the action. And such assessment has not been required where judgment for the possession alone may be given either for the plaintiff or defendant (*Code*, § 53, p. 35). The same consequence would follow if no damages should be recovered, for it is only where the value may be assessed and damages may be recovered, and both added together shall exceed fifty dollars, that a new trial can be had under the succeeding portion of the section in question. That portion of the section applies to that, and to no other class of cases.

It can hardly, with any degree of propriety, be supposed that it was intended to provide for a new trial in that single instance, in actions for the recovery of specific personal property, and to deny it in all others, even though the property itself might exceed the sum of fifty dollars in value, or the damages claimed amount to more than that sum. And yet that would be the result of holding that a new trial in this class of cases can only be had, where the damages recovered, and the value of the property as assessed, together exceed the sum of fifty dollars. Important claims by way of liens upon the property in controversy, and for the value of the property itself, are often, as well as necessarily, made in this class of actions, and no more reason exists for concluding the parties asserting them, or against whom they may be

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asserted by the result of the judgment rendered by the justice, than does where the action may be brought or defended solely for the recovery of money. The claim or claims mentioned in this section of the Code may be made as well in this class of cases, so far as they may have become connected with the principal subject of the controversy, as they can in any other; and when they are legally and properly set forth in the pleadings and judgment demanded for them, they as clearly entitle the parties to the action, to a re-trial of the cause in the county court on appeal as if the claim stood by itself in an action for the simple recovery of damages. No reasonable ground exists for supposing that it was intended that a party should be entitled to a re-trial of his cause in the county court on appeal, where the claim or claims made by the pleadings exceed the sum of fifty dollars, and the action may be brought, or defended solely for their recovery, and that the same privilege should be denied, where a claim or claims of an equal amount may be made in an action for the recovery of specific personal property. The same reason exists for allowing a re-trial in the county court in the latter case that does in the former. And it cannot be supposed that in this respect the legislature intended to make any distinction between the different cases. The object of the latter clause of the sub-division referred to, was to give the parties a re-trial on appeal in the county court, in a class of cases where they would not have been entitled to it under the preceding provision. That was where no claim should be made by the pleadings on either side exceeding the sum of fifty dollars, and yet the damages recovered and the value of the property as assessed, together exceeded that amount.

The fair reading of this portion of the section is, that re-trials may be had in all cases brought into the county courts by appeal without reference to the form of the action, where the claim or claims for judgment made by the pleadings of either party shall exceed the sum of fifty dollars, and also, in

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actions for the recovery of specific personal property, where no claim or claims exceeding that amount may be made, provided the damages actually recovered, added to the assessed value of the property, shall exceed that sum. The claim made by the plaintiff for damages for the detention of the property in controversy in this cause did exceed the sum of fifty dollars, and for that reason the action should have been re-tried in the county court. The judgment must be reversed, and a new trial ordered, with costs to abide the event.

Hamilton agt. Third Avenue R. R. Co.

N. Y. SUPERIOR COURT.

THOMAS HAMILTON, plaintiff and respondent, agt. THE THIRD AVENUE RAILROAD COMPANY, defendant and appellant.

Where a passenger on a horse-railroad car, enters the car near one end of the route and pays full through fare, he is entitled to go through without any further payment of fare.

If on stopping the car at the depot, with the announcement that it does not go any further, and the passenger is directed, with the others, to take another car, which is waiting for them, but no transfer ticket is given him, but he is informed by the driver of the waiting car that the passengers from the car that has stopped will not have to pay any further fare, and, subsequently, the conductor calls on this passenger for his fare, who refuses to pay again, as he had paid once, and the conductor, per force, removes him from the car for such non-payment, although the conductor may be strictly within the rules of his duty to the company, the railroad company are liable for damages to the passenger not only for compensatory, but for exemplary damages. In this case, \$500.

Corporations, as well as natural persons, are liable for exemplary damages.

General Term, October 1872.

Before FREEDMAN, and CURTIS, JJ.

THE action was brought to recover damages claimed to have been sustained by plaintiff in consequence of being put off one of the defendant's cars for an alleged non-payment of fare.

Upon the trial plaintiff testified that a few minutes after 12 o'clock, on the 20th day of June, 1868, he took passage at 90th street and 3rd avenue on defendant's car, No. 75, on its downward passage, and paid the usual fare of seven cents; that upon reaching the depot at 65th street the car turned and went into the depot, and its conductor told the passengers to change cars; that plaintiff, with the other passengers, left car No. 75; that defendant's car No. 2 was waiting to receive them; that being told by the conductor

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of car No. 2 that if he came off car No. 75 he was all right, and would not need a transfer ticket, he went in and seated himself in car No. 2; that car No. 2, thereupon, proceeded on its trip towards the city hall, and at about 59th street its conductor asked plaintiff for his fare; that plaintiff declined to pay again; that, thereupon, the car was stopped, and the conductor fetched plaintiff to the front platform to put him off; that plaintiff then took hold of a handrail by the window to resist the attempt to push him off; that the conductor pinched plaintiff's hand and pulled it open, and then succeeded in forcing plaintiff off; that the plaintiff, thereupon, took the next car, and upon payment thereon of six cents fare was carried to his destination.

The defendant produced three or four witnesses, who testified that car No. 75 did not run so as to connect with car No. 2; that car No. 75 was a through car, and on the day specified by plaintiff did not run into the depot, but continued its through trips, and that for this reason the occurrence, as stated by the plaintiff, could not have happened.

The case was submitted to the jury, and under the charge of the court to the effect, among other things, that in case they found for the plaintiff they might assess exemplary as well as compensatory damages, the jury found a verdict for plaintiff to the amount of \$500.

The defendant moved, upon a case made at special term, for a new trial, which motion was denied.

The appeal is from the order denying motion for a new trial and also from the judgment.

By the Court: FREEDMAN, J.—The defendant, by omitting to move for the direction of a verdict and by going to the jury without objection, conceded that the case presented a sufficient conflict of evidence to authorize its submission to the jury. Having voluntarily taken the chance of a favorable verdict at their hands, which would have concluded the plaintiff, upon the facts, we must hold, upon the authority

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of *Rowe* agt. *Stevens* recently decided by this court and reported in (12 *Abb. N. S.* 389), that the defendant cannot be permitted to complain of an adverse verdict, by arguing that the case presented no evidence to be submitted to the jury, or at least presented such a preponderance of evidence on defendant's side as to admit of no other verdict except one in defendant's favor.

Allowing, at the commencement of the trial, the amount claimed in the complaint to be increased from \$3,000 00 to \$5,000 00, without a previous notice of motion therefor, was a matter resting in the discretion of the court. (*Richtmeyer* agt. *Remsen*, 38 *N. Y.*, 206; *Meyer* agt. *Fiegel*, 7 *Robt.*, 122). Not the slightest harm has accrued to the defendant from such amendment, and consequently no reason exists for the interference of the general term with the exercise of that discretion.

The detailed statements made by the court, in charging the jury, of other similar cases and of the action of the courts therein, and the remark to plaintiff's counsel in reply to said counsel's announcement, that he had no exceptions to take, involve no error, but present mere questions of propriety. These are not reviewable on a bill of exceptions and can only be considered on a motion for a new trial, if assigned as a specific ground for the granting of a new trial for the reason, that the jury may possibly have been influenced thereby. Not having been thus urged, we must disregard them on appeal.

Defendant's exceptions to the rulings of the court below in admitting certain evidence and to the refusal of the court to reinstruct the jury, after their retirement under an elaborate charge covering the point respecting which additional information was sought, are clearly untenable.

On the trial defendant's superintendent testified that if a passenger "leaves one car and gets on another he must either pay his fare or produce a transfer. If he does neither, the instructions of the company are to put him off, using as

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little force as may be necessary. The only guide to the conductor is the fare or a transfer." Upon this testimony the court was justified in charging that putting a passenger off from a car in case of refusal to pay fare is within the line of the duty and employment of defendant's conductors. And the jury, having by their verdict adopted plaintiff's version of the occurrence, instead of believing the testimony of defendant's witnesses, defendant's liability to respond in damages became fully established. For it is well settled that if an act is done by a servant in the business of the master and within the scope of his employment, the master is liable to third persons for any abuse of the authority conferred and for injuries resulting from any error of judgment or mistake of facts by the servant, as well as for those resulting from a negligent or reckless performance of his duties. This rule applies equally to corporations and natural persons (*Weed* agt. *The Panama R. R. Co.*, 17 N. Y., 363; *Sandford*, *Admr.* agt. *The Eighth Ave. R. R. Co.*, 23 N. Y., 343; *Drew* agt. *The Sixth Ave. R. R. Co.*, 26 N. Y., 51; *Higgins* agt. *The Waterliet Turnpike Co.*, 46 N. Y., 23).

The remaining question, therefore, is, to what extent the law will hold the defendant liable. This is a grave and most important question. Upon this point the jury were instructed that in case they found for the plaintiff they might assess exemplary as well as compensatory damages. The latter were held to be such as would compensate the plaintiff for the injuries actually sustained, including his pain and anguish of mind and body. The former were defined as damages, which are given as an example by way of punishment, to prevent a repetition of the wrongful act complained of, and they were described as something in the character of a punishment by the people, with the difference, however, that the person injured is the one that recovers the damages instead of the people, by fine or imprisonment.

At the same time the jury were severely cautioned against rendering a verdict for an excessive amount. They were instruct-

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ed that the case is not one calling for severe punishment; that if they came to the conclusion that they must find damages for the plaintiff, and that they must be exemplary as well as compensatory damages, they should consider the character of the offense, and affix a sum within the limits of reason by way of example, but not as an act of impulse or of passion, and that they should decide between the plaintiff and the corporation defendant, as they would decide between man and man. These definitions and instructions were not only substantially correct, but eminently proper, if the case itself justified the instruction in any manner, that the jury might give exemplary in addition to compensatory damages. Damages for pain and anguish of body and mind are not exemplary or punitive in their character in any strict or proper sense of those terms, but compensatory *Morse* agt. *The Auburn & Syracuse R. R. Co.* (10 *Barb.*, 621), and in actions for injuries to the person occasioned by the negligence of the defendant, it has been repeatedly held that the plaintiff may recover damages for his pain and suffering not only down to the time of the trial, but future suffering, which the evidence renders reasonably certain, must, necessarily, result from the injury, may also be compensated (*Curtis* agt. *Rochester & Syracuse R. R. Co.*, 18 *N. Y.*, 534; *Affg.*, *S. C.*, 20 *Barb.*, 282; *Caldwell* agt. *Murphy*, 1 *Duer*, 233; *Affid. in* 11 *N. Y.*, 416).

The same rule as to compensatory damages applies with still greater force to actions of assault and battery, and it is no answer to the enforcement of the rule, that the assault was committed by an agent, if committed by such agent in the line of his duty and within the scope of his employment. In such case the master is liable as principal.

Now, in *Caldwell* agt. *The New Jersey Steamboat Co.*, (47 *N. Y.*, 296), the present court of appeals fully indorsed the principle that in any case, where exemplary damages may be recoverable against the servant, they should be allowed against the master, if it appears that he had reasonable

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notice of the negligent habits of the servant, or if he left the servant without control or supervision in the work. In addition, it was distinctly held, that corporations are not exempt from the infliction of punitive damages in a proper case. That the case at bar is one of that character, seems to be clearly apparent from the decision of the supreme judicial court of Maine in *Goddard agt. The Grand Trunk Railway*, reported as a leading case upon the points involved in the 10th volume of the new series of the *American Law Register*. Justice WALTON, in delivering the opinion of the court in that case in favor of sustaining a verdict of \$4,850 00, discusses at length the question of the liability of corporations as common carriers of passengers for the unlawful acts of their employees committed upon such passengers, to whom the said corporations, as such carriers, owe the legal duty of exercising the highest degree of care that human judgment and foresight are capable of, to make the journey safe. He then gives an interesting review of the origin, growth and application of the doctrine of exemplary damages, and points out that the said doctrine is even more beneficial in point of public interest in its application to corporations than in its application to natural persons. His reasoning upon this point commends itself so forcibly to the intellect, and it is so fully sustained by the numerous authorities cited in its support, that further elaboration of the subject here would be a work of supererogation. A simple reference to it is amply sufficient.

There being no error in the proceedings below, the judgment and order appealed from must be severally affirmed with costs.

CURTIS, J. concurred.

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SUPREME COURT.

FRIEND PITTS, *et al* agt. MARY ANN PITTS, *et al*.

The statutory provisions on the subject of *dower*, confines the effect of adultery by the wife, in barring her claim for dower, to cases in which such adultery is established by a judgment of the court.

The effect of *condonation* restores the wife's right to *dower*, even if forfeited by the adultery, and if such fact is found in the divorce suit, the previous adultery works no forfeiture. (*Affirming S. O. at special term ante p. 64.*)

New York General Term, January, 1873.

THIS is an appeal from an order denying a motion to vacate and set aside an order directing the payment of certain moneys paid into court being the value of the contingent inchoate right of dower of one of the defendants in this action which was brought for the partition of certain real estate in New York city.

A full statement of the facts appear in the decision rendered at special term, and reported in 44 *Howard; P. R.*, p. 64.

GARDINER, WARD & WAGSTAFF, *for appellant.*

I. The right of the respondent, Rachel Ann Pitts, to the moneys secured by this mortgage, was dependent on the issue of the divorce suit. If by the issue of that action her dower was barred, she had no claim to those moneys.

II. By the issue of the action for divorce the respondent was barred of her dower.

(a.) § 48, *Article third, title 1., chap. 8 part 2* of the Revised Statutes reads thus: "A wife being a defendant in a suit for a divorce brought by her husband, and convicted

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of adultery, shall not be entitled to dower in her husband's real estate or any part thereof," &c.

The respondent is brought clearly within this provision. She has been convicted of adultery in a suit for divorce brought by her husband. The question arises on the meaning of the word convicted, though that seems plain.

1. Convict, *Latin convinco*. To overpower by proving a charge against me; to prove guilty (*Worcester's Dictionary*).

2. To prove or find guilty of an offence or crime charged, to pronounce guilty as by legal decision (*Webster's Dictionary*).

3. "But if the jury find him guilty he is then said to be convicted of the crime whereof he stands indicted, which conviction may accrue two ways—either by his confessing the offense and pleading guilty, or by his being found so by the *verdict* of his country" (*Blackstone's comm., Book 4., 362*).

4. A referee combines in his own person both judge and jury. His findings of fact stand for the verdict of a jury. Like the verdict of a jury they are conclusive in case of a conflict of evidence (*Hoogland agt. Wright, 20 How., 70*).

5. The referee found the respondent guilty of an act of adultery. His report was confirmed, and judgment of this court entered upon it. This judgment practically says: The defendant is proved guilty of adultery, but a divorce is denied because the plaintiff has forgiven the offense by cohabitation.

6. It is objected that this is not a conviction because the judgment is for a dismissal of the complaint, and does not in terms recite that the defendant was guilty of adultery; but the verdict of a jury, or findings of fact by a referee on which a judgment is rendered, are necessarily parts of the judgment itself. They are the grounds on which the judgment necessarily proceeds, and like the judgment itself, may be pleaded as an estoppel in a second action between the

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same parties (*Betts* agt. *Starr*, 2 Coms., 550; *Edwards* agt. *Stewart*, 15 Barb., 67).

III. That this is a case for which the statute is intended to provide, is evident from the course of legislation on the subject.

(a.) The *Statute Westm., Second*, 13 Edw. i, ch. 34, provided that "if a wife willingly leave her husband and go away, and continue with her advouterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly and without coercion of the church, reconcile her and suffer her to dwell with him, in which case she shall be restored to her action (2 *Inst.*, 433).

(b.) Sec. 7 of Chap. 4 of the laws of 1787, substantially, and almost *in hæc verba*, re-enacts this statute, and such the law remained until the revision of 1830.

(c.) In 1830 the revisers submitted to the legislature as sec. 8 of Title 3., Chap. 1, Part 2, the following:

"If a wife commit adultery, and the fact be established against her, either by a *decree dissolving* the marriage contract, or by proof in an action brought by her to recover her dower, she shall be barred forever of all claim and right to dower of her husband's lands; unless it be shown, that after knowledge of such adultery, her husband was reconciled to her, and that he permitted her thereafter to dwell with him, in which case she shall be restored to her right of dower" (5 *N. Y. Stat. at large*, Edms., 335).

This section was struck out, and in its stead the legislature enacted these two sections, viz. § 8 title 3, chap. 1, part 2:

"In case of divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed." And also § 48, article 3, title 1, chap. 8, part 2.

"A wife, being a defendant in a suit for a divorce brought by her husband and convicted of adultery, shall not be

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entitled to dower in her husband's real estate, or any part thereof," &c.

(d.) These alterations were made by the legislature, not in wantonness, but for a purpose which will be manifest on analyzing the Statutes.

The Statutes of Westminster and 1787 provided:

1. That elopement and adultery by the wife barred her dower.

2. That such adultery could be proved against her, like any other fact, in any action by her to recover her dower.

3. That reconciliation with the husband restored her dower.

The Revisers attempted to provide:

1. That adultery of the wife should bar her dower.

2. That a decree dissolving the marriage contract on the ground of her adultery should be proof sufficient of such adultery.

3. That in the absence of such decree such adultery might be proved against her in an action by her to recover her dower, like any other fact.

4. That reconciliation with the husband should restore her dower.

The legislature changed the old law, and refused to adopt the recommendation of the revisers, but provided:

1. That a decree dissolving the marriage contract for the *misconduct* of the wife should bar dower.

2. That if in a suit for divorce brought by the husband the wife was *convicted* (i. e., proved guilty) of adultery, she should be barred of her dower.

They refused to provide as the old law had done, and as the revisers recommended:

1. That adultery of the wife could be proved by heirs or legatees, like any other fact in bar of her action for dower.

2. That a condonation of such adultery should rehabilitate her in her right to dower.

The construction of the statute contended for by the

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defendant wife, and adopted by the learned judge below, would make both these provisions of the Revised Statutes mean the same thing, rendering one mere surplusage, and decide the legislature to have enacted precisely what the revisers recommended, although they manifestly intended no such thing.

(e.) Much light upon the proper interpretation of this statute is contained in *Reynolds* agt. *Reynolds*, 24 Wend., 192.

IV. The order appealed from should be reversed, and an order entered vacating the order of September 4, 1872, and directing an assignment of the mortgage in question to John Pitts.

RICHD. L. H. FINCH, *for respondent*.

I. The appellants' moving papers clearly show that the respondent, Rachel Ann Pitts, wife of John Pitts, was legally entitled to the order of September 4, 1872, directing the payment of the \$802 7-100 to her.

II. This sum of \$802 7-100, paid into court under the decree of March 24, 1870, was the value of her then contingent inchoate right of dower in the real estate partitioned in this action, she having refused to execute a release. And upon the payment of this \$802 7-100 into court by the execution of the bond and mortgage, bearing date July 8, 1870, this money became immediately vested in Rachel Ann Pitts the respondent (4 R. S., Eds. ed., 511, 512; *Bartlett* agt. *Van Zandt*, 4 Sandf., Ch., 396; *Gray* agt. *Cook*, 24 How., 432).

(a) This sum of \$802 7-100 was paid into court and secured by bond and mortgage for Rachel Ann Pitts' security and investment, and remained in court subject to her application for the same.

This sum being her sole property, she was legally entitled to it whenever she applied to the court for it. And her hus-

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band, John Pitts, the appellant, has no interest in or control over the same (*Benedict agt. Seymour*, 11 *How.*, 176 ; see p. 178).

III. There are but two grounds upon which the respondent, Rachel Ann Pitts' claim and right to this \$802 7-100 can be defeated :

1st. By her voluntary release under her hand and seal.

2d. By the judgment or decree of the court, dissolving the bonds of matrimony, for misconduct—adultery.

(a) Neither of these exist. She never executed a release of dower, and the bonds of matrimony have never been dissolved. She is still the wife of John Pitts, the appellant.

IV. Dower cannot be forfeited except by the decree or judgment of the court adjudging a forfeiture (*Scribner on Dower*, vol. 2, p. 502, § 9 ; *Tyler on Infancy and Coverture*, pp. 578-9, § 414 ; *Reynolds agt. Reynolds*, 24 *Wend.*, 192 ; *Coper agt. Whitney*, 3 *Hill*, 99 ; *Wait agt. Wait*, 4 *N. Y.*, 95 ; *Forrest agt. Forrest*, 3 *Abb.*, 165).

V. John Pitts, the appellant, is estopped from setting up the alleged adultery by reason of his voluntary cohabitation with his wife.

Condonation wipes out adultery, and restores the offending party to her original status, and prevents the granting of a decree or judgment upon the adultery (2 *R. S.*, *Edms. ed.*, 151, § 42 ; *Willard's Eq. Juris.*, 657).

VI. The finding by a referee of an act of adultery, followed by a finding of an act of voluntary cohabitation condoning the act of adultery, vitiates and neutralizes the act of adultery so found, and bars a conviction.

VII. There can be no "conviction" in an action for divorce on the ground of adultery without a decree or judgment, and there can be no decree or judgment where cohabitation or condonation is established and found.

(a) The judgment of Jannary 17, 1872, in the divorce suit, is in favor of Rachel Ann Pitts and against John Pitts, dismissing his complaint and action with costs.

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(b) "A judgment is the final determination of the rights of the parties in the action" (*Code*, § 245).

VIII. This dower fund of \$802 7-100 was created by the decree of partition, entered in this action March 24, 1870, and was the value of Rachel Ann Pitts' contingent inchoate right of dower in the property partitioned and sold, and was secured by the bond and mortgage bearing date July 8, 1870. The report of the referee in the divorce suit bears date October 25, 1871. The judgment upon the report was entered January 17, 1872, in favor of the defendant and against the plaintiff, dismissing the plaintiff's complaint.

So there was no finding by the referee in the divorce suit until some nineteen months after the entry of the decree of partition, and some fifteen months after the bond and mortgage were given securing the value of this dower interest.

IX. Had the referee, in the divorce suit, decided the same in favor of John Pitts, the plaintiff, and against Rachel Ann Pitts, the defendant therein, it would not have availed John Pitts, the appellant, as this dower fund of \$802 07 became vested in Rachel Ann Pitts, the respondent, more than a year before the divorce suit was decided.

X. This dower interest having been once vested the same cannot be divested except by the voluntary release of Rachel Ann Pitts, as there was no judgment decree or finding of any referee against her upon any point at or before the vesting of this dower fund in her.

(a) It is, therefore, submitted, that in no aspect of the case can the respondent be deprived of her right to this \$802 7-100, as it was the value of her then present contingent inchoate right of dower in the distributive share of her husband in the proceeds of the sale of the real estate partitioned and sold under the decree of this court, entered in this action, on March 24, 1870.

XI. The affidavit upon which the motion was founded is not made by the appellant, John Pitts, nor by his attorney

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of record, and, therefore, the motion was not properly before the court.

XII. The order appealed from should be affirmed with costs.

INGRAHAM, *P. J.*—We think it was clearly the intent of the legislature by the statutory provisions on the subject of dower, to confine the effect of adultery by the wife in barring her claim for dower to cases in which such adultery is established by a judgment of the court. It may well be doubted whether either of those provisions (5 *N. Y. Stat. at L.*, 335, §§ 8-48), apply to a case which arises after a divorce has been obtained. Section 8 only applies to a case where the divorce is granted for the misconduct of the wife, and section 48 applies to a case where the defendant is convicted of the adultery in a suit for a divorce brought by the husband, neither applies to adultery committed unless the wife is convicted of the offense. If, upon the trial, the plaintiff fails on account of condonation of the offense, there is no conviction. COKE says: "If the wife is pardoned before the death of the husband she shall be endowed."

So, also, if she is reconciled to her husband after elopement.

The effect of condonation restores her right to dower even if forfeited by the adultery, and if such fact is found in the divorce suit the previous adultery works no forfeiture.

The order was right, and should be affirmed.

Concurred in by BRADY. *J.*

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N. Y. SUPERIOR COURT.

FRANCIS A. PALMER agt. JOHN FOLEY.

The clerks and officers in the bureau of the chamberlain of the city of New York, including the deputy chamberlain, were not intended by the legislature to be, and were not in fact, included within the power of appointment and dismissal which is conferred upon the comptroller by the 32d section of the charter of 1870; and it follows that the alleged appointment set up by the defendant in his answer to the office of deputy chamberlain, as his sole defense to the action, is invalid and void.

January Special Term, 1873.

THE comptroller of the city of New York, Andrew H. Green, Esq., claimed the right to appoint, under a provision of the charter of 1870, the deputy chamberlain, and the defendant Foley was so appointed by him. The plaintiff, as chamberlain, denied the right claimed by the comptroller, and brought an action, and moved for an injunction, to restrain defendant from interfering with the business of the chamberlain's office and from intruding himself into said office.

ABRAHAM R. LAWRENCE *and* JOHN W. EDMONDS, *for plaintiff.*

JOHN H. STRAHAN, R. W. TOWNSEND *and* A. R. DYETT, *for defendant.*

BARBOUR, C. J.—This is a motion for an injunction pending the litigation of an action. The complaint alleges substantially that the plaintiff is the chamberlain of the city of New York, and that in the exercise and performance of his duties and powers as such officer he did, on the 16th of May, 1872, appoint Walter B. Palmer to the office of deputy

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chamberlain of the city, and that the latter has ever since been, and now is, exercising and performing the duties of such office; that on the 6th of January, instant, the defendant intruded upon and attempted to take possession of the office of the deputy chamberlain, claiming from the plaintiff the right to be received and recognized as such deputy, and upon the plaintiff's refusing so to recognize and receive him, then gave notice and proclaimed that he intended, at all events, to exercise the duties and powers of the office of deputy chamberlain.

The plaintiff further avers that there is annually paid into his hands, as city chamberlain and county treasurer at least \$50,000,000, several millions of which are constantly in his hands, and that it is his official duty to carefully preserve, safely keep, and disburse the same according to law, and that the intrusion of the defendant into the said office and his continued persistence in exercising the powers of a deputy chamberlain are calculated to produce great confusion in the city and county treasuries, to hazard the safe keeping, &c., of the public moneys, and to increase the responsibility of the plaintiff. The complainant, therefore, prays that the defendant may be restrained from intruding into the said office, or exercising any of the functions of the office of deputy chamberlain, and for general and further relief, and also asks for an interlocutory injunction restraining the defendant as aforesaid *pendente lite*. None of those allegations are denied in the answer except the averments touching the appointment, &c., of Walter B. Palmer as deputy chamberlain, which are denied; and the defendant avers that he was, on the 6th of January, current, duly appointed by the comptroller of the city to the office of deputy chamberlain, and, thereupon, took the oath of office, furnished the security required by law, and entered upon and has since exercised some of the powers and duties of such office.

The defendant also claims in his answer that Walter B. Palmer, the mayor, aldermen, and commonalty of the city

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of New York, and the people of the state, are necessary to the action. The objection taken at the hearing to the jurisdiction of the court upon the ground that the action was brought to determine the title to an office cannot be sustained. It is true the complaint alleges that Walter B. Palmer has been duly appointed, and is, in fact, the deputy chamberlain, and that the defendant is not, although he claims to be such officer. But it does not ask the court to determine the conflicting claims of Walter B. Palmer, but only that the plaintiff may be protected in the performance of the duties and obligations imposed upon him by law, by means of an injunction against such an actual and threatened intrusion and interference by the defendant, under color of an alleged appointment as deputy chamberlain, with the records and papers in the chamberlain's office, and with the public funds in the plaintiff's hands, as may work a material injury to him personally. Nor will it be necessary for the court to determine or even to consider, either upon this motion, or at the final hearing in the action, whether Walter B. Palmer is, or is not, the deputy chamberlain, except possibly in so far as such fact may be useful as inferential evidence.

Indeed the allegation in the complaint touching the appointment of Walter Palmer appears to be merely the assertion of a collateral fact, which in no manner affects the personal rights of the plaintiff to the relief he seeks, and it might therefore be wholly stricken from the bill as surplusage or immaterial matter without injury to his claim. The right of the plaintiff to an injunction is not to any extent founded upon those allegations. The question whether the defendant is really the deputy chamberlain or not is of course a very important one in the controversy, as it constitutes the sole ground of his defense by way of justification. But it is the defendant and not the plaintiff who has raised the question by his pleading, and for that reason it cannot properly be claimed by him, who has thus pleaded the fact in

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his answer, that the action is brought or maintained by the plaintiff for the purpose of establishing or determining the title to an office. So, too, as to the point made by the defendant in his answer and by his counsel at bar, that Walter B. Palmer, the mayor, &c., of the city, and the people of the state are necessary parties to the action. It is the personal action of the plaintiff as an individual, and it can be maintained upon no other theory than that he is entitled, upon the facts set forth in the complaint, to relief by way of injunction as a matter of private and personal right. Neither of these persons, therefore, can be deemed a necessary party to the action for any purpose.

As the allegations of the complaint to the effect that fifty millions of public moneys annually pass through the plaintiff's hands, that several millions are constantly there, that it is his duty to carefully preserve and safely keep the same, and that the acts of the defendant which are complained of are calculated to produce confusion in the treasuries, hazard the safe keeping of the moneys, and increase the responsibility of the plaintiff, are wholly uncontroverted on the part of the defendant, those averments must be taken to be true. An examination of the statutes read at the hearing also shows that the city chamberlain is, in fact, the treasurer of the corporation, as the name imports, and as such chamberlain is, *ex-officio*, the treasurer of the county, and the custodian of the moneys derived from taxation in the county of New York and belonging to the state, as well as the custodian of such moneys belonging to estates, trusts, litigants, &c., as are directed by the courts to be deposited with him; that some, or all of those moneys, are deposited by the chamberlain, or upon his direction, in certain banks designated by him by written notice to the comptroller, and are withdrawn therefrom by him for the purpose of making such payments as he is from time to time duly and legally required to make; that it is his duty not only to look carefully to the safety of those moneys, but to see that no money is paid out in excess

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of the proper appropriation therefor, even though he may be required to do so by the warrant or requisition of the comptroller, countersigned by the mayor; that books containing accounts of all receipts, payments, as transfers by him, with the vouchers therefor, are kept in his office; and that by law a deputy chamberlain may be appointed, who shall have, and in the chamberlain's absence may exercise, all the powers so conferred upon the chamberlain.

In view of all this, it is easy to see that if the plaintiff shall, either wilfully or negligently, permit the moneys in the treasuries to be withdrawn therefrom by any one except himself, or by a properly appointed and duly qualified deputy chamberlain, he will be personally liable for any loss the city, county, state, or other party for whom he holds moneys may sustain thereby; and it follows that the plaintiff has such a personal and pecuniary interest in the subject-matter of the action and in its results as entitles him to prosecute and maintain the same. It is equally clear, too, that unless the defendant has established the fact upon the hearing here, that he is in fact and in law the deputy chamberlain of the city, the plaintiff is entitled to the injunction he asks for. That question, therefore, must now be considered.

In April, 1866, an act was passed by the legislature which authorized the city chamberlain to appoint a deputy, fix his salary, and dismiss him at pleasure (*Laws of 1866, ch. 623*). The first paragraph of the thirty-second section of the charter of 1870 provides that "the heads of all departments * * * shall have power to appoint and remove all chiefs of bureaus (except the chamberlain), as also all clerks, officers, employes, and subordinates in their respective departments." The comptroller was then the head of the finance department, in which there was and for many years has been "a bureau for the reception of all moneys paid into the treasury of the city, and for the payment of money on warrants drawn by the comptroller and countersigned by the mayor," the chief officer of which was the

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chamberlain (*Laws of 1870, p. 375, ch. 37, sec. 7*). That statute does not in terms repeal the act of 1866, although it does directly and specifically repeal a number of other acts; but it contains this general repealing clause: "All acts inconsistent with the provisions of this act are also hereby repealed" (*Ib. sec. 120*).

There can be no doubt that the act of 1866, which gives to the chamberlain the power of appointing and removing his own deputy and clerks is wholly inconsistent with the first paragraph of the thirty-second section of the statute of 1870, above cited, if that paragraph was intended by the legislature to confer the power of appointing and removing the same officers upon the comptroller. The language of the paragraph in question, when read by itself and not in connection with the other part of the section, and regardless of the probable design and intention of the legislature, is sufficient to give to the comptroller the power of appointing and removing the officers and clerks in the chamberlain's bureau, including the deputy chamberlain. But that power cannot be held to have been in fact conferred upon the comptroller, if upon an examination of the entire act of 1870 in connection with former enactments in *par materia*, and the surrounding circumstances as shown by the evidence before the court, it clearly appears that the legislature did not intend to grant such power to him (*See Dwarris on Stat., 530 and Seg. 1 Burrows, 447; Dresser agt. Brooks 3 Barb., 429; McCarter agt. Orphan Asylum 9 Cowen, 437; Goldson agt. Bucks, 15 East., 377; Williams agt. Pritchard, 4 Term R. Q.; 1 Kent's Com., 462*). The legislation in this state in relation to local government and management of counties, towns, cities, and villages, from the earliest period in its history down to the enactment of the so-called charter of this city in 1870, shows that it has always been a fundamental principle in the policy of the state government that the various treasurers or custodians of the public moneys should be placed beyond the control and power of those

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officers who were charged with the duty of auditing claims and directing the payment thereof, in so far, at least, as concerned the custody and safe keeping of such funds.

Indeed, in the limited time which my official engagements have permitted me to devote to the examination of the numerous statutes upon the subject, I have been unable to find a single instance during all that time in which any person or persons charged with the duty of auditing claims against counties, towns, or municipalities, have been empowered by law to appoint the treasurers thereof except for short periods in cases of vacancy occasioned by death, resignation, &c. In view of that long-preserved and well-established course of legislation it is more reasonable to believe that the failure to insert an exception of the deputy chamberlain in the first paragraph of the thirty-second section of the charter. was the result of some accident or mere clerical omission, than that it was so designed and intended to be by the legislature. The fact, too, that while the power of appointing and removing all the other heads of bureaus in the finance department, except the chamberlain, was given to the comptroller, the latter officer was especially excepted from the provision, as he always has been, still further strengthens the presumption that the legislature did not design to confer upon the comptroller the power of appointing or removing the deputy chamberlain. For as the deputy was vested by law with all the powers of the chamberlain himself, and was authorized to exercise the same to the fullest extent in the absence of the principal, there was certainly as strong and the same reason for placing the power of appointing and removing the custodian of the public moneys, beyond the reach of the comptroller in the one case as in the other.

The principle of thus separating treasurers from the accounting officers was probably adopted, and has been long adhered to in order to guard against collusion between those two classes of officers, while clearly the power of appointing and removing the deputy chamberlain might enable a

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dishonest comptroller, at some future term, to rob the treasury of millions by means of his own appointment. But beyond all that the act of 1866 not only authorized the chamberlain to appoint his own deputy and clerks and to fix their salaries, but it directed that the salaries of all those officers, as well as the rest of the chamberlain's office, should be paid by the banks which were the depositories of the public moneys, and that act was not only in full force at the time the act of 1870 was passed, but so much of it, at least, as relates to the payment of the salaries, and office rent was wholly unaffected by the latter act, and, indeed, it is understood as now an existing law. The thirty-second section of the act of 1870 reads as follows: "Sec. 32. The heads of all departments, except as otherwise specifically directed herein, shall have power to appoint and remove all chiefs of bureaus (except the chamberlain), as also all clerks, officers, employes, and subordinates. The number of all officers, clerks, employes, and subordinates in every department (except in the police and fire departments), with their respective salaries and compensations, shall be such as the head of each department shall designate and approve, except that the aggregate expense thereof shall not exceed the total amount duly appropriated by law to each department for such purposes."

It will, thus, be seen, that while the first paragraph of this section makes no provision in regard to the salaries of the officers and clerks, who are there authorized to be appointed by the heads of departments, the second paragraph, in so far as concerns the department of finance, groups the whole of such appointees together, including as well the clerks and officers in the office of the chamberlain, whose salaries were to be paid by the banks under the act of 1866, as those whose salaries were chargeable upon the city treasury, and makes a provision in regard to the aggregate expense of all those officers, clerks, &c., with reference to the appropriation therefor, which is quite inconsistent with

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the theory that the officers, clerks, &c., whose salaries were to be paid by the banks were intended by the legislature to be included among those whom the comptroller was authorized to appoint.

For these reasons, I am of opinion that the clerks and officers in the bureau of the chamberlain were not intended by the legislature to be, and were not, in fact, included within the power of appointment and dismissal which is conferred upon the comptroller by the thirty-second section of the charter of 1870 ; and it follows that the alleged appointment set up by the defendant in his answer as his sole defense to the action, is invalid and void. The plaintiff's motion for an injunction pending the controversy, must, therefore, be granted with costs, to abide the event of the action.

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SUPREME COURT.

GILCHRIST agt. GILCHRIST'S Executors.

It is the well stated rule that it is pretty much a matter of course to permit parties to amend their pleadings before trial, when the amendment will produce no delay of the trial, nor work any especial hardship to the adverse party. The terms imposed are usually the payment of the costs of the motion, and such other costs and expenses, if any, as the party will lose by reason of the desired amendment. *Held*, on this motion, that the defendant be allowed, under the above rule, to amend his answer by setting up the statute of limitations.

It is the duty of the Court to put *statutory defenses*, such as the statute of limitations, usury, &c., upon the same footing with other legal defenses.

Saratoga Special Term, January, 1873.

BOCKES, J.—Motion for leave to serve an amended answer, setting up, among other defenses, the statute of limitations.

It is pretty much a matter of course to permit parties to amend their pleadings before trial, when the amendment will produce no delay of the trial, nor work any especial hardship to the adverse party. This is now the settled rulings of the courts (*see Wait's Code, remarks and authorities cited under section 173 of the Code*). And the terms imposed are usually payment of the costs of the motion, and such other costs and expenses, if any, as the party will lose by reason of the desired amendment.

Subject to these restrictions, it is always deemed, in furtherance of justice, to allow amendments of pleadings, in order to place the parties face to face before the court on the facts and law of the case. In this case it does not appear that the plaintiff will lose any right by the proposed amendment, existing at the time of the commencement of the action, or at the time the original answer was interposed,

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nor will he suffer such delay, if now allowed, as should be held to defeat the motion. The defendant should therefore be permitted now to interpose any just, legal and equitable defense which he may have to the action, on the terms as to costs and expenses above indicated.

But it is insisted that the statute of limitations is not a just or equitable defense; hence, now to permit it to be interposed in this case would not be "in furtherance of justice." It is urged that the defense of usury and the statute of limitations are unconscionable, and should not be permitted, unless promptly interposed, and, should never be allowed to be interposed as a matter of favor. Such, I think, was the very general ruling prior to the Code (6 *Cow.*, 606; 1 *Cow.*, 158; 1 *Wend.*, 302; 2 *Wend.*, 294; 3 *Wend.*, 573; 6 *Hill*, 223; 6 *Hill*, 227). These are few of the many cases holding to this rule prior to the Code. So, too, there are many similar decisions since the Code (21 *How.*, 455; 22 *How.*, 229; 7 *How.*, 234; 20 *How.*, 72; 37 *How.*, 23). There are other cases also to the same effect as those cited since the Code. All the above cases held the rule that the defense of the statute of limitations (or usury) was a strict defense; and if the party let it slip, the court would not relieve him. In the case of *Bates* agt. *Voorhees* (7 *How.*, 234), the propriety of this rule was questioned. Judge HARRIS there remarked that the soundness of a discrimination by the courts against defenses denominated unconscionable might well be doubted; and he added that he did not see upon what principle a court should take upon itself to pronounce a defense, with which the law has provided the defendant, hard or unconscionable. The learned judge adhered, however, to what he deemed the settled rule. But there are also more recently many cases holding that the discrimination above suggested was unauthorized and improper. It is said that usury and the statute of limitations are legal defenses, based upon principles of public policy, and should be recognised by the courts, as standing on the same footing

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with other legal and equitable rights, such as payment, accord and satisfaction, and set off (12 *How.*, 408; 4 *How.*, 216). In this last case cited, PARKER, J., is reported as saying that, so long as the statute made the taking of usury a defense, it was entitled to be treated like every other legal defense, and he would make no discrimination in imposing terms. This remark received the approval of DAVIES, J., in *Brown* agt. *Mitchell* (12 *How.*, 408). More recently it was expressly decided in *Sheldon* agt. *Adams* (41 *Barb.*, 54), that "in exercising the power of allowing amendments in furtherance of justice, no discrimination should be made by the courts between legal defenses offered to be set up on account of their character; that all defenses, recognized by statute as being such, including those styled unconscionable, such as the statute of limitations, usury, &c., stand upon an equal footing in this respect." In this case, POTTER, J., say that this "is now the settled doctrine of the court of appeals." The cases in the court of appeals will presently be considered. Subsequently, and in 1867, this subject was again under examination in the *Bank of Troy* agt. *Bassett* (3 *Abb.*, N. S., 359), and the former rule of discrimination, in regard to statutory defenses, was disapproved. We come now to the cases in the court of appeals. In *Catlin* agt. *Gunter* (11 *N. Y.*, 368), it is said that "we are not warranted in applying a different rule to the defense of usury from what we would hold applicable in other cases;" and further, "the law has not made any distinction between such defenses, and those where no forfeiture is involved, and the court can make none." These remarks are cited with approval in two of the cases above referred to, and express, as I conceive, the opinion of the highest court in the state. Again, in *McQueen* agt. *Babcock* (3 *Keyes*, 428), although the precise question here presented was not up, Judge GROVER, speaking for the court, says, "the idea that the defense of usury, or of the statute of limitations, was to be treated in this respect different from other defenses, has been

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exploded. Courts now regard all legal defenses as entitled in this respect to the same consideration." The learned judge was here speaking of the right of amendment. So, I think, Judge POTTER was right in saying (41 *Barb.*, 57), that it is the settled doctrine of the court of appeals no longer to mark a rule of discrimination in allowing amendments of pleadings against statutory defenses, such as usury and the statute of limitations. Upon reflection, I think Judge PECKHAM spoke well when he said in the *Bank of Kinderhook* agt. *Gifford* (40 *Barb.*, 659), in substance that we have no right to say that a defense declared by statute is inequitable and wrong, for it is saying that the law is inequitable and wrong. He adds: "It is no necessary part of a judge's duty to define or declare the wisdom of any legislative enactment; the act being plain, the court have but one duty, and that is to declare and enforce it. There is no excuse whatever for attempting to evade and nullify it." Further, in considering the subject, he says that the weight of authority is decidedly to the effect "that, on opening a default properly excused, the court will not impose as a condition that the defendant shall not set up what is termed a hard or unconscionable defense, as usury or the statute of limitations; and he furthermore remarks: "There should be no selection or choice by the court as to what law should be enforced or what should be evaded or nullified; what should be favored, and what should be treated with disfavor. The principle and policy of this favor and disfavor are wrong."

It, then, it is the duty of the court to put statutory defenses upon the same footing with other legal defenses, it seems to me that the amendment asked for should be allowed. If the proposed defense sought to be interposed were payment, release, or accord and satisfaction, there should be no hesitation in allowing it on the usual terms; and if the statute of limitations is to be treated with the same consideration as payment would be, then that also should be

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permitted. That it should be so regarded seems now to be settled both on principle and authority. I can add nothing to what has been said on this subject in the numerous cases cited, nor is it needful where, as I conceive it, the rule by which I must be governed has been repeatedly and definitely settled by the courts. I think I am bound by authority to grant the motion. As stated in the outset, it is pretty much a matter of course to permit parties to amend their pleadings at any time before trial, when it will produce no delay, nor work any peculiar hardship to the adverse party. It is the right of both parties to have the entire case before the court on the facts and the law. Thus, to admit the case complete, in all its aspects, is in furtherance of justice. I do not see that any delay or injury, of which any one can rightfully complain, will result by allowing the amendment proposed.

Motion granted on payment of costs.

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SUPREME COURT.

THE PEOPLE of the State of New York, on the relation of
ELIZA HARNETT, agt. THE INSPECTORS OF COMMON SCHOOLS
of the Seventeenth Ward of the City of New York.

A teacher of common schools, who claims, under a regular appointment, a salary due her for such services, cannot have a mandamus to compel the inspectors of common schools to examine and audit such salary. She has a remedy at law if she holds under a legal appointment.

New York Special Term, January 7, 1873.

Before BARRETT, J.

Motion for a peremptory *mandamus* against the defendants to compel them to examine and audit the claim of the relator. The facts are as follows :

The relator claimed that on August 26, 1872, she was duly appointed, by the trustees of common schools of the seventeenth ward of this city, as general assistant in male department of grammar school No. 13 (formerly old public school No. 14), at a salary of eleven hundred dollars per annum, and that she entered upon her duties at the opening of the school after vacation, September 2, 1872, and performed the duties required to be performed as a teacher during the months of September, October, November, and December, 1872; that her name was placed upon the pay rolls for each of the said months, duly certified by the principal and a majority of the trustees of the said ward. That the inspectors of the said district, Andrew Mills, Harvey H. Woods and William E. Brinckerhoff, had neglected and refused to examine and audit the salary of the said relator for said months or either of them. That by reason of said neglect and refusal to audit, she has been unable to receive or obtain payment for her said

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services, amounting to the sum of three hundred and sixty-six dollars and sixty-six cents.

That on December 31, 1872, she caused a demand in writing to be served upon Andrew Mills, Esq., to forthwith examine and audit the said salary; and that the inspectors had neglected to examine and audit said claim; and that the examination and audit was a condition precedent to her right to demand payment from the department of public instruction. On these facts Hon. E. L. FANCHER, on the 6th day of January, 1873, issued an order requiring the inspectors to show cause why a peremptory mandamus should not issue against them commanding them forthwith to examine and audit the salary of the said relator.

On the return of said order the inspectors claimed that the only record of the appointment of the relator on file with the clerk of the department of public instruction, showed the appointment of the relator was made on the 9th day of October, 1872, and that at that time, according to said notice, a large number of other teachers were appointed in said department; and that, by the by-laws of the said department of public instruction, the whole number of teachers which the trustees were authorized to appoint at the date of such appointment in said school was twelve, and that the number of teachers actually employed at that date by the said trustees was thirteen, including the relator, which was one in excess of the number of teachers allowed in said department, and that by said notice of appointment the relator's name appeared to be the last one appointed. The inspectors also claimed that they had audited the claim of the relator, and that they had disallowed the said claim for the reason of excess of teachers in said department.

The counsel for the relator claimed that Miss Harnett, having been appointed by the trustees, was entitled to receive her salary, and that the action of the inspectors was unjust and illegal, and that they could not question the right of the trustees to appoint, and that the relator had no remedy by

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an action at law. And that although the notice, filed with the clerk of the department, showed the relator's name as the last appointed, the fact was that she was the eleventh appointment, and produced the affidavits of two of the trustees of the said ward, viz. : Richard V. Harnett and Stephen Therry, showing that she was the eleventh appointment.

The counsel for the inspectors, Mr. Anderson, claimed, among other things, that the inspectors having disallowed the claim after examination and audit, that the remedy by mandamus would not lie ; that that writ could only issue to set the inspectors in motion when they have refused to act, and cited a large number of authorities to sustain that proposition. He also claimed that the rule that a mandamus will not issue where there is a remedy by action, applies in this case. He further claimed that by the laws of this state the duties of the inspectors were to "examine in respect to every expense certified by the trustees, and to audit any such expense which may be just and reasonable." And that it was for the inspectors to say what were just and reasonable, and the inspectors were also required to examine in respect to the number, fidelity and competency of the teachers. And that at the time of the appointment of the relator, there being an excess of teachers in said department, the appointment of the relator by the trustees was illegal, and gave the relator no right to recover for any services she might have rendered ; and that the appointment of the relator by the trustees was in violation of the general rules and regulations of the department of public instruction.

GEORGE W. WINGATE, *for the relator.*

A. C. ANDERSON, *for inspectors.*

BARRETT, J.—The motion must be denied without costs. I think the relator has a remedy at law if she holds a legal appointment. It will not, therefore, be necessary to pass upon the other questions which were argued.

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N. Y. SUPERIOR COURT.

MORRIS FALKENAN *et al.*, plaintiffs and respondents, agt.
WILLIAM G. FARGO, President of the American Merchants
Union Express Company, defendant and appellant.

Where a shipper and owner of goods, at the time of delivering the same to an express company for transportation, also deliver to the express company for their signature a blank receipt in their possession, filled up by him at his office, containing the names of both parties, and a series of conditions and clauses regulating the manner of transportation and the liability of the express company in certain cases and contingencies, and such receipt at the time of the delivery of the merchandize is presented by the shipper to the express company for their signature, and is signed by the latter and returned to the shipper, it constitutes a *special contract*, and binding upon both parties when acted under.

Where such contract provides that the express company is not to be held liable for any loss or damage by fire, they are not liable where the goods shipped are burned up, without any fault or neglect on the part of the company, while in *transitu*.

General Term, November, 1872.

Before BARBOUR, Ch. J., FREEDMAN and SEDGWICK, JJ.

THE action was brought to recover the value of a package of jewelry belonging to the plaintiffs, and delivered by them to the American Merchants Union Express Company to be transported and delivered by said company to A. B. Van Cott, plaintiffs' agent at Milwaukee, Wisconsin; but which, owing to the negligence of the company, never reached its place of destination. The answer admitted the receipt of the package, but denied the allegations of the complaint as to contents and value, and the company's negligence. It then set up as follows:

"That at the time of the delivery of the said package to the company there was delivered by the shippers of said package to the said company, for their signature, an agree-

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ment partly written and partly printed, which agreement was signed by the said company, and re-delivered to the shippers of said package, and accepted by them; that said agreement constitutes the sole and only contract between the parties to this action respecting the forwarding and transporting of the said package, and by the terms thereof the said company is not liable beyond the sum of fifty dollars for the loss of the said package.

“Defendants further aver that by the failure on the part of the shippers of the said package to inform the defendants of the value of the same, defendants were deprived of their just reward for the transportation of the same.

“Defendants further aver that they undertook to transport the said package according to the directions thereon, and used all reasonable care and diligence in the prosecution of their said undertaking; that the defendants being made to believe by the plaintiffs the said package contained ordinary merchandize only, placed the same in their car with their ordinary merchandize for transportation as aforesaid; that the said car, while on the Michigan Central Railroad, near Ann Harbor, Michigan, was burned with all its contents, including the package in question, on the night of the 16th of October, 1870, without any fault or negligence on the part of the defendants; that had the defendants known or had any reason to believe that the said package was a valuable one, they would not have placed the same in said car with their ordinary merchandise, but would have placed the same in their safe with other valuable packages, and that in that case the said package would not have been destroyed and lost to plaintiffs.”

Upon the trial, plaintiffs proved the value of the package to be \$1,658 16, and rested.

After defendants' motion for a dismissal of the complaint had been denied, defendants' counsel called upon plaintiffs to produce the contract referred to in the answer. It was

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produced and put in evidence by the defendant, and marked "Exhibit A." It read as follows:

"American Merchants Union Express Company, New York, Oct. 15, 1870. Received of Falkenan, Pollak & Co., 1 pkge. said to contain ———, valued at ———, value not given ——— dollars. Marked A. B. Van Cott, Milwaukee, Wis., which we undertake to forward to the nearest point of destination reached by this company, subject expressly to the following conditions, namely: This company is not to be held liable for any loss or damage except as forwarders only, nor for any loss or damage by fire, by the dangers of navigation, by the act of God, or of the enemies of the government, the restraints of government, mobs, riots, insurrections, pirates, or from or by reason of any of the hazards or dangers incident to a state of war. Nor shall this company be liable for any default or negligence of any person, corporation or association to whom the above-described property shall or may be delivered by this company for the performance of any act or duty in respect thereto, at any place or point off the established routes or lines run by this company; and any such person, corporation or association is not to be regarded, deemed or taken to be the agent of this company for any such purpose, but on the contrary such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this company received the property above described. It being understood that this company relies upon the various railroad and steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any damage to said property caused by the detention of any train of cars, or of any steamboat upon which said property shall be placed for transportation; nor by the neglect or refusal of any railroad company or steamboat to receive and forward the said property.

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"Nor shall this company be liable for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof is herein stated; nor upon any property or thing unless properly packed and secured for transportation; nor upon any fragile fabrics unless so marked upon the package containing the same; nor upon any fabrics consisting of, or contained in, glass. This company will not be liable for any loss or damage unless the claim therefor shall be made in writing within thirty days from the accruing of the cause of action, in a statement to which this receipt shall be annexed. The party accepting this receipt hereby agrees to the conditions herein contained.

"For the company, McKINNEY, Agent."

Plaintiffs admitted that the body of the paper, exhibit "A," was written in by the plaintiffs at their office, and that the same so filled up was presented by them to the defendants for their signature when the package in question was delivered to the defendant; that it was then signed by the defendants and re-delivered to the plaintiffs.

Plaintiffs also admitted that the package in question, with its contents, was burned while *in transitu*, without fault or negligence on the part of the defendants. Testimony closed.

Defendant's counsel moved that the complaint be dismissed on the ground that as under the evidence no negligence was proved on defendant's part, the plaintiffs cannot recover. Motion denied and defendants excepted.

Defendants' counsel moved the court to instruct the jury to find a verdict for the defendants upon all the evidence. Motion denied; defendants' counsel duly excepted.

Defendants' counsel moved the court to instruct the jury that in any event the plaintiffs are not entitled, under the evidence, to recover beyond the sum of \$50, with interest from the time the cause of action, if any, accrued. Motion denied; defendant's counsel duly excepted.

The court directed the jury to render a verdict for the

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plaintiffs for the sum of \$1,832 26, being the value of the package, with interest. Defendants' counsel duly excepted.

The court directed judgment to be suspended, and the exceptions to be heard, in the first instance, at general term.

By the court; FREEDMAN, J.—The plaintiffs in this action are not in a position to claim the benefit of the doctrine that a common carrier cannot secure a limitation or restriction of his common law liability by a mere notice indorsed upon or incorporated in his receipt, and that such notice is, at most, only a proposal for a special contract, which requires the assent of the shipper to its terms. According to the evidence, the plaintiffs had in their possession a blank receipt for the transportation of merchandise, which contained the name of the American Merchants' Union Express Company as forwarders, the name of plaintiffs' firm in large Roman capitals, as shippers, and a series of conditions and clauses regulating the manner of transportation, and the liability of the express company in certain cases and contingencies. This blank receipt was filled up by the plaintiffs at their own office, and the receipt, as thus prepared, was thereafter, namely, at the time of the delivery of the merchandise for transportation, presented by plaintiffs to the express company for signature. It, therefore, constituted a proposal, on the part of the plaintiffs for a special contract, which was wholly of their own creation, and in the making of which they had not been influenced by any act on the part of the company.

Now, as every person is presumed to intend that which is the ordinary and natural consequences of his own purposed act, it follows that when the express company assented to such proposal by signing the same and re-delivering it to the plaintiffs, the proposal ripened into a special contract, and as such it became binding upon both parties. In regard to the provisions of that contract plaintiffs cannot be permitted to plead ignorance. Upon this point the case at bar is analogous to *Breese agt. U. S. Telegraph Company* (45

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Barb., 274, affirmed in 48 N. Y., 132); and *Westcott* agt. *Fargo*, decided by the general term of the supreme court of the fourth department at the June term of 1872.

The liability of the company is to be measured, therefore, by the terms of the special contract, and by that it is provided that the company is not to be held liable for any loss or damage by fire.

Now, although that provision does not include loss or damage by fire, occasioned by the carelessness or negligence of the company, or its agents, or servants, in respect to which the common law liability of the company remained unaltered (*Simmons* agt. *Law*, 3 *Keyes*, 217; *Maguin* agt. *Dinsmore, President, &c.*, decided by the general term of the court on the 1st of January, 1873), yet, plaintiffs having admitted on the trial not only that the merchandise was burned while *in transitu*, but also that this occurred without fault or negligence on the part of the company, nothing remained, upon which, under the terms of the contract, a liability on the part of the defendants for the loss, which had thus occurred, could be predicated (*Lamb et al.* agt. *Camden & Amboy R. R. & T. C.*, 46 N. Y., 271).

The clause that the company shall not be liable for any loss or damage of any box, package, or thing, for over fifty dollars, unless the just and true value thereof is stated in the receipt, cannot, by any just construction of the whole instrument, be made to work by the mere neglect of the shipper to declare the value a limited liability on the part of the company when no liability outside of it exists. Until a liability is actually incurred the limitation clause remains a mere dormant stipulation.

When, therefore, it appeared from the uncontroverted and admitted facts of the case that the company was, in respect to the transportation of the merchandise in question, only an ordinary bailee or private carrier for hire according to the terms of the special contract, that by the latter the company was wholly exempted from liability for loss or damage

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by fire ; that the merchandise was destroyed by fire, while *in transitu* ; and that such fire occurred without fault or neglect on the part of the company, or any of its agents or servants, the verdict, instead of being directed in favor of the plaintiffs, should have been directed for the defendants.

Defendants' exceptions must be sustained, the verdict set aside, and a new trial ordered, with costs to appellant, to abide the event.

BARBOUR, Ch. J., and SEDGWICK, J., concurred.

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EDWIN R. LAKE agt. ARNOLD & MORSE.

Each surety on a bond given by a non-resident plaintiff on commencement of an action must *justify*, if excepted to. The justification of one surety only is in sufficient.

Special Term at Chambers, September, 1872.

Before DALY, Ch. J.

THE action was commenced on a bond given under the statute for a non-resident as security for costs in the case of *Sheldon* agt. *Lake*, in pursuance of an order made on motion.

The defendants, as sureties, signed the bond; one justified by affidavit on being excepted to, and the other declined to justify. The bond was duly filed, but was not approved of.

As one of the defendants did not justify, an order was entered dismissing the action, "the plaintiff, a non-resident, not having filed security for costs."

The defendant in that action now commences this action against the sureties, and the answer sets up the failure to file security for costs by the non-justification of one of the sureties on the bond, and the dismissal of the action for want of security as a defense.

The plaintiff now moves to strike out the defendants' answer as frivolous, and for judgment.

M. M. BUDLONG *for the motion.*

T. C. CRONIN *opposed,*
cited *Ward* agt. *Symes and others*, 4 Coms., 171.

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CHAS. P. DALY, *Ch. J.*, denied the motion, holding that the answer put in issue a material allegation as to the execution of the bond, and that within the above authority each surety must justify, and the bond be approved of; and the allegation in the answer, if true, constituted a defense; and that the practice required that the question of law be raised by demurrer, if the plaintiffs wished to proceed in the action.

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SUPREME COURT.

MATTHEW D. MANN, et al. agt. THE CITY OF UTICA & another.

It has been settled by authority that an action in *equity* may be maintained to prevent a *cloud* to be cast upon real estate, as well as to remove a cloud already created.

Consequently an action to restrain a city from proceeding to sell real estate under a prior assessment, which is claimed to be irregular under the city charter, is properly brought by the owner of the property.

And where, pending the litigation in such action, it is apparent that such irregularities exist, and the defendants (the city) apply to and procure an act to be passed by the legislature, by which the assessment is hereby confirmed and declared to be of the same force and effect as if no informality or error had occurred in the making of said assessment, and the amount assessed shall be a lien on the property assessed:

Held, that the clear purport and intent of the act was to validate and make good the assessment, and charge the assessment upon the lands of the plaintiffs as well as the other owners of property benefited.

The act referred to is entitled as follows: "An act to confirm an assessment for the expense of paving Broad street, in the city of Utica," passed May 16, 1872.

This act is not *unconstitutional and void*. Because, 1st. It is, as alleged, contrary to section 1 of art. 1 of the constitution. 2d. Because, as alleged, it is contrary to section 6 of art. 1.

Neither is the act void, because, as alleged, it is a private and not a public act, and embraced more than one subject.

Nor is the act invalid, because, as alleged, it is *retroactive*, or an *ex post facto* law.

The plaintiffs having established, by the admissions of the pleadings and proofs, that when the action was commenced they were entitled to some relief from the court, the complaint ordered dismissed with taxable costs of the plaintiffs, recoverable of the defendants.

Oneida Special Term, October 1872.

THIS action is brought by two plaintiffs, owners, as tenants in common, of two lots on the north side of Broad street, in the city of Utica, against the city and its treasurer, to declare void all assessments made by the city on said lots to defray the expenses of paving said street and expenses connected therewith, and to restrain the defendants from

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enforcing the assessment by leasing the premises pursuant to the provisions of the city charter.

The answer contains denials of some of the allegations of the complaint with other defenses.

This action was commenced 30th January, 1872, and a demurrer was interposed to the complaint, and in April, 1872, at a special term, held by Justice MORGAN, the demurrer was overruled.

The legislature, by an act passed May 16th, 1872, confirmed the assessment, and declared "the amount assessed" shall be a lien on the property assessed.

C. D. ADAMS *and* JOSEPH R. SWAN, JR., *for plaintiffs.*

S. M. LINDSLEY *and* CHARLES MASON, *for defendants.*

HARDIN, J.—In the assessment proceedings taken by the common council of the city, the lands belonging to the plaintiffs are described, and the assessment is made as though A. C. Miller was the owner or occupant of the property. His name appears upon the assessment, signed by the mayor, Oct. 7th, 1871, preceding the description of the property of the plaintiffs, and was carried in the same manner into the collector's warrant issued to collect the assessment. He was neither owner or occupant, and refused to pay the assessment.

The defendants then commenced proceedings to sell the property described in the complaint, and were about to make such sale when they were restrained by a preliminary injunction issued in this action. The assessment not having been made to the "owner or occupants" of the lots was void, and hence did not bind Miller or these plaintiffs, and could not be enforced out of their property legally (8 *Barb.*, 493; 23 *N. Y.*, 281; 18 *Barb.*, 393; 43 *N. Y.*, 107, 118).

It is claimed by the plaintiffs that the assessment is invalid, because there was no "plans and specifications" filed with the clerk prior to the passage of the resolution of the

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4th of February, 1870, according to the requirements of §99 of the charter.

The first publication was the 9th of February, 1870, of notice that applications were pending, and that final action would be had by the common council on the evening of the 18th February, 1870.

Then no plans and specifications had been filed with the clerk, and the surveyor's plan of the work was actually filed 14th February.

It is, therefore, insisted, that the final action on the 18th February, 1870, was not in compliance with the provisions of the charter.

The first part of §99 confers upon the common council generally power to cause any street to be graded, leveled, paved, or repaved, as it shall deem necessary. Following are the words in reference to causing a "plan and accurate specifications to be prepared and filed with the clerk." There are no words of express prohibition against taking the subsequent steps prior to the filing of such plan and specifications.

But the language used seems to be mandatory, in so far as it requires "the plan and accurate specifications" prior to the passage of any ordinance for such work (46 N. Y., 42; 47 N. Y., 560; *See also, sec. 105 of charter*).

Every provision of a statute designed for the protection or security of persons whose property is sought to be taken, must be substantially complied with before the proceedings will be upheld (43 N. Y., 107).

The plaintiffs allege other irregularities and informalities in respect to the assessment in question, but it is not necessary to consider them in detail; they are enumerated in the pleadings.

The defendants' learned counsel has submitted an elaborate argument against the right of the plaintiffs to maintain an action in equity to set aside the proceedings already had and to prevent those which were being and about to be

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taken by the defendants at the time of the commencement of the action.

It has been settled by authority that an action in equity may be maintained to prevent a cloud to be cast upon real estate, as well as to remove a cloud already created (5 *Paige*, 493 ; 6 *Paige*, 292).

By section 49 of the charter it is provided: "The tax lists filed with the clerk or delivered to the treasurer, shall, in all courts and places, be evidence of the imposition of the taxes therein contained, and the taxes therein assessed upon, or in respect to any real estate shall be liens thereon for two years from the time the tax lists are filed with the clerk."

The assessment complained of by the plaintiffs may be said to be "in respect to" their real estate, and to be declared to be "a lien thereon for two years."

By section 54 of the charter it is provided that if the taxes remain unpaid, the treasurer shall publish a notice of sale for eight weeks, that the lands assessed, "or in respect to which they are imposed, will be sold to the person who shall take the same for the shortest period."

Proceedings under this section had been taken when this action was commenced, for the purpose of selling the plaintiff's lands.

Section 55 of the charter provides that: "Upon making any sale of real estate under the provisions of the last preceding section, the treasurer shall execute two certificates of the fact * *" containing a description of the property sold * * stating the particular tax or assessment * * for which the sale was made, and providing that if the same shall not be redeemed within fifteen months, the purchaser will be "entitled to a deed thereof." One of the certificates shall be filed with the clerk, and one delivered to the purchaser.

"Such certificate shall be presumptive evidence of the facts therein contained." Then follows section 58, which provides that if the lands so sold shall not be redeemed,

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“the treasurer shall execute to the purchaser or purchasers * * a deed or deeds thereof, or of the parts unredeemed for the period for which it shall have been purchased, “containing a description of the premises, of the fact of the assessment, advertisement and sale, the date of the sale, the price for which the premises were sold, and the time of the service of notice to redeem, which deed or deeds may be recorded as a lease of real estate, and shall be presumptive evidence in all courts and places that such tax and assessment was legally imposed, and that the proceedings to authorize such sale was duly taken, and in all respects correct, and such grantee may obtain possession thereof in the manner prescribed by law in relation to persons holding over demised premises * * and shall have, hold and enjoy the said premises so sold during the term for which the same were granted * * free and clear from all liens, claims and demands of any other owner or occupant of the same.”

It appears quite conclusively by the provisions quoted, that the declaration and deed are made presumptive evidence of the regularity of the proceedings, and that “such tax was legally imposed,” and the proceedings “duly taken, and in all respects correct; and that to avail of some of the objections existing as to said assessment, proof of facts extrinsic and *aliunde* of the proceedings is necessary, and therefore the plaintiffs, according to the authorities applicable to this case, were entitled to maintain an action in equity, to remove and prevent a cloud upon their premises, and to restrain the threatened sale thereof (*Mayor &c. agt. Meserole*, 26 Wend., 132; *Van Doren et al. agt. the Mayor of New York*, 9 Paige, 358; *Matthews agt. the Mayor of New York*, 14 Abb., 209; *Lewis agt. the City of Buffalo*, 29 How., 335; *Scott agt. Onderdonk*, 14 N. Y., 9; *Heywood agt. the City of Buffalo*, 14 N. Y., 534; *Hatch agt. the City of Buffalo*, 38 N. Y., 276; *Allen agt. the City of Buffalo*, 39 N. Y., 386; *Crook agt. Andrews*, 40 N. Y., 547; *Mas-*

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terson agt. Hoyt, 55 Barb., 520; Tilden agt. the Mayor of New York, 56 Barb., 360).

But since this action was commenced there has been a legislative enactment in respect to the assessment authorized by the common council, which must be considered in determining whether the plaintiffs are entitled to any relief, and if any, to what extent that relief shall be given.

It is a familiar rule in equity cases which permits courts to take into consideration subsequent events, happening after the commencement of the action in equity, and determining what relief shall be granted, especially where part of the relief asked for is an injunction from the court to restrain parties (*Lyon agt. Brooks, 2 Edws. Ch., 110; Willis agt. Chipp, 9 How., 568; Carpenter agt. Bell, 19 Abb., 263; Beebe agt. Dowd, 22 Barb., 259; 1 Barb. Ch., 140*).

The act referred to is found in the 2d vol. of session laws of 1872, page 1,786, chapter 741, and is entitled as follows: "An act to confirm an assessment for the expense of paving Broad street in the city of Utica." This act was passed May 16, 1872, and is as follows:

"Sec. 1. The assessment for the expense of paving a portion of Broad street in the city of Utica, made and confirmed by the common council of said city, September twenty-second, 1871, is hereby confirmed and declared to be of the same force and effect as if no informality or error had occurred in the making of said assessment, and the amount assessed shall be a lien on the property assessed."

Prior to the passage of the act the common council, in virtue of the provisions of the charter, possessed the power, if exercised in accordance with the provisions of the charter, to make an assessment for the expenses of grading the street; that power was improperly exercised in respect to the plaintiff's property.

The work had been performed, the expenses had been incurred, and the city was liable to pay for the same. The

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plaintiffs, in justice, should bear their proper share of the expenses, and the defendants were attempting to enforce the collection of some \$2,300 from the plaintiffs or their property.

Informalities and defects, and insufficiencies existed in those proceedings, and an application was made to the legislature, and the act in question was passed.

That assessment was "confirmed and declared to be of the same effect as if no informality or error had occurred."

The clear purpose and intent of the act was to validate and make good the assessment in question, and to charge the assessment upon the lands of the plaintiffs, as well as the other owners of property benefitted by the improvements, and named in the assessment made by the common council.

The act declares the "amount assessed shall be a lien on the property assessed."

The items for a well, and for "superintending the work, &c.," included in said "amount" so assessed, do not render inoperative or invalid the act, nor can they be held to vitiate the assessment. This is true even if it be assumed that the charter expressly forbid the payment for such additional or extra items of expenditure (19 N. Y., 116; *Brewster agt. City of Syracuse*, 35 N. Y., 467).

The learned counsel for the plaintiffs insists that the act of the legislature is unconstitutional and void: 1st. Because it is contrary to section 1 of article 1 of constitution. 2d. Because contrary to section 6 of article 1

The law must be held valid, notwithstanding the objections stated, and the ingenious argument submitted in support thereof. The legislature have exercised the taxing power, and apportioned the tax; the act was passed in the exercise of the taxing power possessed by the legislature, and private property is not taken in virtue of the right of eminent domain.

The authorities leave no room for doubt or discussion by

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this court upon the objections above stated (*Providence Bank* agt. *Billings*, 4 *Peters*, 514; *Thomas* agt. *Leland*, 24 *Wend.*, 65; *Griffen* agt. *the Mayor of B.*, 4 *Coms.*, 419; *Town of Guilford* agt. *Sups. Chenango*, 3 *Kern.*, 143; *Brewster* agt. *City of Syracuse*, 19 *N. Y.*, 116; 24 *Barb.*, 232; 31 *N. Y.*, 574; *Crowell* agt. *Lawrence*, 41 *N. Y.*, 123; *Howell* agt. *City of Buffalo*, 37 *N. Y.*, 267; *People* agt. *Osborne*, 57 *Barb.*, 663; *Gordon* agt. *Comes*, 47 *N. Y.*, 608.

It is insisted that the act in question is void because it is a private and not public act, and that it embraces more than one subject.

The substance of the act is to confirm the assessment, and to declare the amount thereof a lien upon the lands or "property assessed."

There is but one subject matter embraced in the act, that being the "assessment," and declaring the effect thereof. The title sufficiently indicates the subject matter; the object of the enactment. The legislature has some discretion in respect to the degree of particularity as to the expression of the objects of the enactment in its title (*Ins. Co.* agt. *New York*, 4 *Seld.*, 241; *Brewster* agt. *City of Syracuse*, 19 *N. Y.*, 117).

In the case last cited the title was less particular than the one before the court, and the act embraced the assessment and collection of a tax, and was upheld (*The People* agt. *Hules*, 35 *N. Y.*, 253).

The declaration of the law in the case is merely for the purpose of furthering the collection of the assessment (*Gordon* agt. *Comes*, 47 *N. Y.*, 615).

It was urged that the act should be held invalid, because it is retroactive.

The legislature declared, under the taxation power, that a certain assessment "is hereby confirmed * * * and shall be a lien upon the property assessed."

Full effect may be given to it by holding that from the

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time of the passage of the act the assessment existed and was valid, and thenceforth became, and was, "and shall be a lien upon the property assessed."

But the act does not interfere with any obligations resting in contract, nor does it in terms take away any vested rights or contain any *ex post facto* provisions.

It apportions upon the plaintiffs their share of the expenses incurred in paving the street in the act named, and presumptively, a sum is charged upon their property equal to the benefit derived by them from the public improvement made necessarily affecting their property.

The plaintiffs, certainly, had no vested rights which gave them in justice or in law any good ground to maintain their enjoyment of the benefits conferred without contributing their just share to the expenses of causing the improvement.

There was only wanting a remedy to enforce payment by the plaintiffs of their just proportion of the expenses of the improvement of Broad street.

It was said in *The City of Syracuse* agt. *Davis* (16 Barb., 188), by the general term in this district, "That statutes were valid which gave remedies when none existed before through defects that would have been fatal had the legislature not interfered and given a remedy by curing interfering irregularities."

In *Locke* agt. *New Orleans* (4 Wallace, 172), it was held, "A statute which simply authorizes the imposition of a tax, according to a previous assessment, is not retrospective."

The same case approves of *Calder* agt. *Buell* (8 Dallas, 390), when a very elaborate opinion was delivered upon retrospective and *ex post facto* laws.

In *Witherspoon* agt. *Duncan* (4 Wallace, N. S. R., 210), it was held that "a state can declare that a tract of land shall be chargeable with taxes no matter who is the owner, or in whose name it is assessed."

In discussing and declaring the unrestricted, and it may be said almost absolute, taxing power of the legislature in the

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case in 31 N. Y., 584, DENIO, J., says: "It is manifestly proper that the tax-payers should have notice of the imposition proposed to be laid upon them. * * But it is for the legislature to determine and prescribe in every case what shall be sufficient, there is not, that I am aware of, any constitutional provision bearing on the subject. * * * The power of the legislature to regulate and change the forms of proceeding in all cases when no vested rights have been acquired under existing law, cannot be questioned." (*Stocking agt. Head*, 3 Denio, 274; *Goold agt. Morse*, 1 Kern., 281; 8 Mass., 468).

PORTER, J., in *People agt. Mitchell*, (35 N. Y., 552), says: "Precise purpose and effect of the confirmatory legislation, of which the defendants complain, was to cure all such defects, as those on which they rely, to justify them in disobeying the statute. It was within the scope of legislative authority to modify the limitations and restrictions in the antecedent act on this subject * * to dispense with prior conditions."

The act now under consideration cannot be declared invalid, for the reason that it contains provisions supposed to be retroactive.

It was passed before an issue of fact was joined in this case, and is alleged by the defendants, in their answer, as ample authority for sustaining the assessment upon the plaintiffs' property for \$2,300 for their share of the expenses incurred by the city in the improvement of Broad street.

The conclusions cannot be reached that the legislation has transcended its constitutional power, and, therefore, force and effect must be given to the enactment.

The decree in this case will, therefore, contain a provision declaring the assessment valid and a lien upon the property so assessed.

But as the plaintiffs have established by the admissions of the pleadings and proofs, that when this action was commenced they were entitled to some relief from this court,

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the complaint will be dismissed with taxable costs of the plaintiffs recoverable of the defendants.

By section 306 of the Code, the costs are in the discretion of the court, and the discretion is exercised as above stated.

The judgment will also contain a provision dissolving the preliminary injunction and a declaration that the plaintiffs are not entitled to the permanent injunction prayed for in their complaint, and that the tax stated in the complaint has been apportioned upon the lands of the plaintiffs, and shall be a lien upon the property assessed.

Cridler agt. Curry.

SUPREME COURT.

MARY O. CRIDLER, appellant, agt. JAMES B. CURRY *et al.*

Where an *administrator's bond* is assigned by the surrogate for the purpose of being prosecuted under the act of 1837, the action may be brought in the name of the assignee as the real party in interest, under § 111 of the Code. If sued in the name of the *people*, as the nominal obligees, the Code, under § 113, allows the action to be brought in that form.

Before the Code, joint and several obligors must have been sued either all jointly, or each one severally. But under § 120 of the Code, all or any of the obligors be included in the same action.

Therefore, where the plaintiff sued only two of the four sureties to the administrators' bond, *held* that the action was authorized by § 120 of the Code.

Fourth Department, January Term, 1873.

Before MULLIN, P. J., and TALCOTT, J.

E. D. SMITH, J., *having made the order appealed from, did not sit.*

APPEAL from an order sustaining a demurrer to the complaint of the plaintiff.

HAKES & STEVENS *for appellant.*

I. Whatever the rule may have been before the Code, the rule now is that "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action, at the option of the plaintiff" (Code, § 120).

In *Brainard agt. Jones and Provost* (11 How., 569), Mr. Justice GREEN, in delivering the opinion of the court at general term, says: "The language of the section must be

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received in its ordinary sense, in which the legislature is presumed to have used it; and when it is plain and unequivocal, there is no room for construction" (p. 571).

In *De Rider* agt. *Schermerhorn* (10 *Barb.*, 638), Judge WILLARD, in delivering the opinion of the court at a general term, says: "At common law, when the contract was joint and several, the plaintiff must sue each separately, or all together." * * "The principle which has been good law from the time of the year books was changed by the 120th section of the Code. The plaintiff is now allowed, at his option, to sue any one or more in the same action" (pp. 640, 641).

Brainard agt. *Jones* was approved in *Strong* agt. *Wheaton* (38 *Barb.*, 623); also in *Eaton* agt. *Balcom* (33 *How.*, 81); also in *Cassman* agt. *Plass* (23 *N. Y.*, 286).

II. The action was properly brought by the plaintiff.

It is therefore claimed that the order appealed from should be reversed, with costs, to the appellant.

WILLIAM RUMSEY *for respondent.*

I. The people should be joined, as a party plaintiff, to the action (*People* agt. *Townsend*, 37 *Barb.*, 520, 529; *People* agt. *Norton*, 5 *Seld.*, 176, 179).

The case of *Baggott* agt. *Boulger* (2 *Duer*, 160), does not hold that such an action may be brought in the name of the beneficiary. It simply holds that the objection that the people should be a party, is waived if not taken by demurrer; all else on that subject is *dictum*.

And if that case does decide that the action need not be brought in the name of the people, it must be deemed overruled by the case of the *People* agt. *Norton* (*supra*); *O'Connor* agt. *Such*, (9 *Bosw.*, 318, 321).

Section 65 of the statute of 1837 provides that the surrogate shall assign the bond for the purpose of being prosecuted (4 *N. Y.*, 498).

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The assignment contemplated by the statute does not change the ownership of the bond. It is simply only the grant of permission to prosecute it (*Baggott agt. Boulger*, 2 *Duer*, 160; *Annett agt. Kerr*, 2 *Robt.*, 556, 566).

The people of the state are still the owners of the bond, and are to be plaintiffs as trustees of an express trust under section 113 of the Code (*People agt. Norton*, *supra*).

The case of *Thayer agt. Clark* (48 *Barb.*, 243), cited by Judge SMITH, does not touch this point. The report does not show that the question was raised on the argument, nor is it mentioned in the opinion of the court, and the case cannot be considered as binding authority upon it. It is in direct conflict with *People agt. Guild*, (4 *Denio*, 551); *People agt. Townsend*, (37 *Barb.*, 520); *People agt. Norton*, (5 *Seld.*, 176); *Annett agt. Kerr*, (2 *Robt.*, 556); *Mayor, &c., agt. Bret*, (2 *Hill.*, 560).

II. The complaint does not state facts sufficient to constitute a cause of action in favor of these plaintiffs.

III. The objection that the administrators, Kingsley and Healy, should be parties defendant, is well taken.

1. The objection is properly taken by demurrer (*Zabriskie agt. Smith*, 13 *N. Y.*, 322; *Eaton agt. Balcom*, 33 *How.*, 80).

2. This proceeding is under *laws of 1837, chap. 460*, §§ 63, 64, 65. The statute does not direct that the sureties shall be sued, but that the bond shall be prosecuted, and there is nothing in it authorizing a departure from ordinary practice in suits on any other obligations.

In suits on joint and several obligations "an ancient and familiar rule of law forbids it to be treated as several as to some of the obligors, and joint as to the rest. The obligee has the right of choice between the two methods of proceeding, but he must resort to one or the other exclusively, and cannot combine both—that is, he must proceed either severally against each or jointly against all" (1 *Parsons on Contracts*, 5th ed., 12).

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Section 120 of the Code provides that, "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes may, all or any of them, be included in the same action, at the option of the plaintiff." But this section does not apply in this case, because,

1. It is confined, by its terms, to the case of persons severally liable, and does not extend to a case where persons are "jointly and severally" liable.

The section was drawn by the commissioners so as to be "conformable to the present statute authorizing suits against different parties to bills of exchange and promissory notes," (*Laws of 1832, chap. 276*). The Code, no doubt, extends the provision to the case of parties liable on a several bond, but it does not change the rule that parties jointly and severally liable must still be sued as at common law (*Morehouse agt. Ballou*, 16 *Barb.*, 289, 292, 293; *Spear agt. Myers*, 6 *Barb.*, 446; *Miller agt. McCagg*, 4 *Hill*, 35).

These cases all hold that the laws of 1832, and later years, made no change in the practice as to the mode of suing joint and several parties liable upon the same instrument, and the case of *Bank of Genessee agt. Field* (19 *Wend.*, 643), is overruled so far as it holds a contrary doctrine by *Miller agt. McCagg*, (*supra*); *Hay agt. Phelps*, (1 *Sandf.*, 66); See *Carman agt. Plass*, (23 *N. Y.*, 286). And there is no reason why the section of the Code should be construed differently from the same words in the statute.

2. The plaintiffs have no authority to maintain these actions, except the authority the statute gives them (*Annett agt. Kerr*, (2 *Robts.*, 556), and, therefore, the action must be brought as directed by the statute. That provides not that the sureties shall be sued, but that the bond shall be prosecuted. There is no authority for suing the sureties alone. All of the obligors are bound, and all should be joined.

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By the court, TALCOTT, J.—This is an action brought upon an administrator's bond, which has been assigned to the plaintiff by the surrogate of Steuben county, to be prosecuted under the act of 1837. The bond is joint and several, executed by the defendants and two other persons. The points presented by the demurrer are two: 1st. That the action cannot be maintained by the plaintiff, but should have been brought in the name of the people, who are the nominal obligees. 2d. That the bond being joint and several, all or only one of the obligees must be sued.

As to the first point, we think the decision of the special term was correct, and that under the circumstances the action may be maintained by the plaintiff in her own name (*Thayer agt. Clark*, 48 *Barb.*, 243). Section 113 of the Code, authorizing the trustee of an express trust to sue, is merely permissive, and does not prevent the real party in interest from suing under section 111. The case of *The People agt. Norton* (9 *N.Y.*, 176), and the other cases referred to by the plaintiff, where actions of this kind have been brought in the name of the people only, hold that the action may be maintained in that form under section 113. Upon the second point we think the special term erred. There is no question but what before the Code joint and several obligors must have been sued either all jointly, or each one severally.

In other words, the plaintiff was bound to treat the obligation either as joint or several. But section 120 of the Code expressly provides that persons severally liable on the same obligation or instrument, may all or any of them be included in the same action at the option of the plaintiff. This rule was first by statute applied to commercial paper in 1837. By the Code, however, the principle is extended to other obligations and instruments. It was early decided by the general term of the eighth district that under this section two of three joint and several obligors may be sued.

The same point is stated by WILLARD, J., in *Dickins agt. Schermerhorn* (10 *Barb.*, 638).

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The rule in *Brainard* agt. *Jones* was admitted by MULLIN, J., in delivering the opinion of the general term of the fifth district in *Strong* agt. *Wheaton* (38 *Barb.*, 616), and was also referred to as correct by DAVIS, J., in *Carman* agt. *Pluss* (23 *N. Y.*, 286).

The defendants are two of the parties who are severally liable on the same obligation, and are therefore within the express language of section 120. Upon this ground the order sustaining the demurrer is reversed, with leave to the defendants to amend within twenty days, on payment of costs.

Hughes agt. Mercan. Mut. Ins. Co.

N. Y. COMMON PLEAS.

JOHN HUGHES agt. THE MERCANTILE MUTUAL INSURANCE COMPANY.

Where a policy of marine insurance was made out to J. H. "for account of whom it may concern," the action to recover the amount of insurance is properly brought by J. H., he being the trustee of an express trust under the Code.

Insurers may contract for antecedent risks, and, by express agreement, insure against a prior total loss.

If a time policy of marine insurance does not contain the words "lost or not lost," but is ante-dated by the insurers, they assume a retrospective risk, for which the policy provides, in the same manner as if it had been issued on the day it bore date.

If a policy of marine insurance describes a vessel insured, as the bark *Empress*, or by whatever other name or names the vessel is or shall be called, and it appears, from the testimony, that the name of the vessel had been changed to the *St. Mary*, it was properly submitted to the jury to determine what vessel was intended to be insured.

On January 25th, 1866, the plaintiff applied to the defendant for insurance upon the bark *Empress*, for account of whom it might concern.

The application was prepared at defendant's office by their secretary, Newcomb, and in a conversation had with, and a statement made by the plaintiff, as to the nature and condition of the property, for which insurance was sought.

On the same day a policy upon the good bark *Empress*, or by whatever other name or names the said vessel is or shall be named or called, insuring her for \$5,000, from December 12, 1865, to December 12, 1866, against perils of the seas and barratry of the master and mariners.

The policy was issued "on account of whom it may concern," loss payable to the plaintiff.

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The name of the bark had been changed, and at the time of said insurance she was known or called the *St. Mary*.

The vessel was lost about January 8, 1866, by reason as was claimed, of perils insured against.

The defendants resisted plaintiff's claim for insurance upon the ground, among others, of misrepresentation as to the name and description of the vessel upon which application for insurance was made. The jury found for plaintiff, and from the judgment entered thereon, appeal is taken.

SCUDDER & CARTER, *for appellants*.

ROBT. P. LEE, *for respondent*.

LARREMORE, *J.*—The principal questions presented by this appeal are: 1st. The identity of the vessel insured.

2d. Plaintiff's knowledge of the loss at the time he applied for and obtained the insurance.

3d. Whether the policy in which the words "lost or not lost," are omitted, was intended to and did cover a total loss existing at the time it was issued.

The jury have found in favor of plaintiff upon the 1st and 2d of these propositions, and the verdict should not be disturbed unless for error upon the trial.

The first objection raised was to the admission of evidence, on the part of the plaintiff, to show upon what vessel he applied for insurance. The defendants insisted that plaintiff was bound by his application, which contained the name of the bark *Empress*. The court allowed him to show the name of the vessel insured. I think this ruling was correct, conceding, as the law requires, *uberrima fides*, in the foundation of the contract, it was competent, upon the issues raised in this case, to admit proof of the acts and declarations of the parties to the contract insured tending to establish the identity of the vessel.

The application for insurance, made by plaintiff, was not a warranty. It is not referred to in, nor made part of, the

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policy. It was intended to give the insurer a just estimate of the risk to be covered. The representation thereon, as to the name of the vessel, is merged in the policy which described the property insured as the good bark *Empress*, or by whatever other name or names the said vessel is, or shall be named, or called.

Plaintiff swore that he applied for insurance on the *St. Mary*, formerly the *Empress*; that she had been renewed and re-classed, and that he said to Newcomb, defendant's secretary, "your own surveyors are the parties who examined her and classed her"; that said vessel was built in Sunderland, England; was sold as one of Parsons' vessels of Hull, and when last heard of was at the isle of Nevassa, loading with guano, for Leith, Scotland. None of the said presentations were shown to have been false. Defendants were referred to "Lloyd's Register" for furniture, information as to the rating of the vessel, and if they or their agent made a mistake in this respect, it should not be charged to the plaintiff (*Rawley agt. The Empire Ins. Co.*, 36 N. Y., 550; *Benedict agt. Ocean Ins. Co.*, 31 N. Y., 393).

The question, too, had reference to the identity of the vessel, and was not intended to vary the terms of the policy. The evidence offered showed that it was a vessel of the class and description named in the policy, and that though insured by the name *Empress*, was also called the *St. Mary*. *Error nominis non nocet cum de re constat*.

No reformation of the policy was necessary, for, by its very terms, it contemplated and provided for such a contingency.

The identity of the vessel being established, a mistake or uncertainty as to the name is not a good ground for avoiding the policy (*Phillips on Ins.*, vol. 1, § 430; *Le Messurier agt. Vaughn*, and *Hall agt. Mollineaux*, 6 East., 382).

There was evidence to sustain the verdict upon the propositions submitted, and also that the loss occurred by a peril insured against.

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The motion to dismiss the complaint on the ground that there was no evidence showing that preliminary proofs of loss had been presented, was properly overruled. Plaintiff testified that he saw such proofs in defendant's possession, and this was not denied. But even if such proof was insufficient, the defendants did not refuse to pay on this ground, but based their objections upon the alleged misrepresentations as to the vessel insured. They should not now be permitted to insist upon a formal defect, which might have been cured if an opportunity had been allowed (*Vos* agt. *Robinson*, 9 *Johns.*, 192; *McMasters* agt. *Western Mutual Ins. Co.*, 25 *Wend.*, 397; *Miller* agt. *Eagle Life and Health Ins. Co.*, 2 *E. D. Smith*, 268; *Bumstead* agt. *Dividend Mutual Ins. Co.*, 12 *N. Y.*, 81; *O'Niel* agt. *Buffalo Fire Ins. Co.*, 3 *N. Y.*, 122; *Kernochan* agt. *N. Y. Bowery Fire Ins. Co.*, 17 *N. Y.*, 428.)

The motion to dismiss the complaint on the ground that plaintiff was not entitled to bring the action, was also properly denied.

The policy insured John "Hughes on account of whom it may concern," and the funds, in case of loss, were payable to him. It appears from the testimony that the policy was for the benefit of McGinnis, the owner of the vessel, and also of the plaintiff, as a security for advances made to said owner. Plaintiff had an interest in the proceeds of the policy to the extent of his advances only, the residue belonging to the estate of McGinnis. The assignment by plaintiff to Bell of the beneficial interest which plaintiff had in the policy, did not divest him of a right of action on the policy, which he held as trustee for the benefit of all concerned in the distribution of the proceeds (*Code*, § 113; *Greenfield* agt. *Mass. Mutual Life Ins. Co.*, 47 *N. Y.*, 430; *Waring* agt. *Indemnity Ins. Co.*, 45 *N. Y.*, 613; *Davis* agt. *Boardman*, 12 *Mass.*, 80; *Ward* agt. *Wood*, 13 *Mass.*, 539; *Copeland* agt. *Mercantile Ins. Co.*, 6 *Peck*, 198).

The defense was not that plaintiff had parted with his

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interest, but that neither he nor McGinnis had an insurable interest in the policy.

That the court unintentionally misstated or missquoted any part of the evidence, is not ground for reversal when (as in this case it appears) the correction asked for was not refused.

The jury are presumed to be governed by their own recollection of the testimony, and the judge, by his charge left the whole matter for them to decide (*Powell agt. Jones*, 2 Barb., 27).

As to the third proposition:

It is conceded that insurers may contract for antecedent risks, and by express agreement insure against a prior total loss.

But it is urged that such a liability must be shown by language indicating such a purpose.

The words usually employed to denote such an intention are: "Lost or not lost;" and the question presented is, whether, in a time policy in which such a clause is omitted, a recovery can be had for a total loss existing at the time such policy was issued.

I see no reason for any distinction between a total or partial loss in respect to the liability of the insurers.

By ante-dating the policy, they assumed the retrospective risk for which it provided, in the same manner as if it had been issued on the day it bore date.

Any other construction would defeat the obvious purpose of this contract. The verdict of the jury repels the presumption of any fraud, misrepresentation or concealment on the part of the plaintiff. The policy under which he claims was intended to cover a possible loss occurring after December 12, 1865. This is evident from the description of the risk and the subject of the contract; and in such a case the insertion of the clause, "lost or not lost," is not strictly necessary (*Marshall on Marine Ins.*, 267-268; *Arnould's Marine Ins.*, 223; *Parson's Marine Ins.*, vol. 2, p. 44;

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Folsom agt. Mercantile Mut. Ins. Co., 8 Blatchf., 170; Hallock agt. Com. Ins. Co., 2 Dutcher, N. J., 268, affirmed in court of errors, 3 Dutcher, 647; see also dicta of Judge STORY in Hammond agt. Allen, 2 Sum., 376 & 397, and Gibson agt. Small, 4 H. of L. cases, 353).

The remaining exceptions are not well taken, and should be overruled, and the judgment appealed from should be affirmed

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SUPREME COURT.

LIVERMORE, CLEWS *et al.* agt. RICHARD BAINBRIDGE.

A referee has no power on the trial to allow a defendant to withdraw a second defense in the answer, consisting of a counter-claim, upon which he commences a cross-action against the plaintiffs, and then allow him to interpose a second defense to the answer in the original action, as an amendment thereof, by inserting substantially, but in a different form, the same counter-claim again, claiming \$130,000 damages; and all this without notice to the plaintiffs or their attorney, except on the motion to amend the answer.

To cap the climax, the referee in this case, before making his report, called upon one of the plaintiffs personally, and suggested to him whether it would not be better for the plaintiffs to settle the matter with the defendant by paying him \$35,000, which defendant would probably accept, as there were matters in evidence in the case which led him to believe that if he did give judgment for the defendant, it would necessarily be for a very large amount. The plaintiffs, having in their complaint, claimed from the defendant on contract some \$17,000, did not feel disposed to accept the friendly advice of the referee, whereupon, a few days subsequently, the referee reported against the plaintiffs, and as due the defendant, the sum of \$120,000.

Judgment vacated, and report of referee set aside for irregularity, and order of reference discharged.

New York Special Term, February, 1873.

THIS was an action to recover a claim growing out of stock transactions. The necessary facts to an understanding of the case will appear in the opinion of the court.

FANCHER, J.—The defendant's testator, Richard Bainbridge, in 1862 commenced dealing with the plaintiffs as brokers. From September, 1862, until May, 1863, the transactions occurred out of which this litigation has arisen. The plaintiffs received from Bainbridge a deposit for a margin, and made purchases and sales, for his account, of stocks, gold and United States demand notes. His original deposit with the plaintiffs was \$5,070 44, and his agreement was to

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keep on deposit with them a margin of ten per cent. on the amount carried for his account. On the 27th of May, 1863, the plaintiffs rendered to Bainbridge an account of all transactions to that date, and on the 12th of August, 1863, a further account was rendered by the plaintiffs to Bainbridge, detailing the transactions from January 1, 1863, to May 30, 1863. By this account a balance appeared to be due to the plaintiffs—\$16,351 45. The account consisted of over five hundred items, and covered thirty-four pages. The plaintiffs assert that there are a few errors in the account, which, corrected, would add \$705 53 to the balance due them from Bainbridge. They admit he should have credit for \$3,519 50 upon the amount due plaintiffs, that being the sum allowed to him by the arbitration committee of the stock exchange in respect of part of the gold held by the plaintiffs on his account.

On the 3d of November, 1863, this action was brought by the plaintiffs to recover the balance thus claimed as due from Bainbridge. It was an action upon an account stated, and the summons was for a money demand on contract. The defendant's answer to the complaint was served on the 19th February, 1863, containing two defenses. The first was to the effect that numerous errors existed in the plaintiffs' account, and the second defense averred that the sales of the stocks, &c., for the defendant's account were unlawful, and that the purchases made to cover short sales were invalid, by reason whereof the defendant averred he had "sustained damage to a large amount, and equal to the amount claimed in the plaintiffs' account."

On the 15th November, 1864, Bainbridge commenced an action against Livermore, Clews & Co., to recover damages for the alleged unlawful sale and conversion of his stocks, gold and demand notes, alleging an improper sale and conversion thereof on the 27th May, 1863, and in that action he claimed damages for \$52,000. It appears that on the 24th January, 1865, a motion was made in the original ac-

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tion, by the counsel for the defendant Bainbridge, to withdraw the second defense above mentioned. The referee, in his letter of March 2, 1870, to Mr. Hewitt, the defendant's attorney, states: "The motion made by you in this case to withdraw your counter-claim, the decision of which was reserved at the time, I have decided to grant, not seeing any prejudice to arise in the action to the plaintiffs herein." Thereupon an affidavit was made on the 3d of March, 1870, by the defendant's attorney, and used in a motion on the cross-action against Livermore, Clews & Co., in which he deposed "that the action now pending before John P. Crosby, referee, does not involve the issues contained in this action; that about the time of the commencement of this action this deponent moved before Mr. Crosby, the referee, to withdraw the second and separate defense therein; that the question of the right of defendant to withdraw said defense was submitted to said referee, and after due deliberation was decided in favor of the defendant in that action."

The referee, by a letter to one of the plaintiffs' attorneys, dated March 3, 1870, informed him of the withdrawal of the second defense. It appears, by the motion papers, that the withdrawal of the counter-claim, or second defense thus referred to, was made for the purpose of some supposed benefit to Bainbridge in his action against Livermore, Clews & Co., and the fact of said withdrawal was made prominent on a motion to stay proceedings in that action, which was decided on the 7th of March, 1870.

At some time thereafter—but when, the papers before me do not disclose—the referee entertained and granted a motion made by the defendant's counsel "to amend the answer so as to include an allegation of damage to defendant by reason of the unlawful acts of plaintiffs, as set forth in the second defense, to the amount of \$130,000, and a demand of judgment for that amount, with costs." This motion was objected to, without avail, by the counsel for the plaintiffs, and the referee, on that new defense, has reported against

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the plaintiffs, and ordered a judgment for \$120,000 and costs. No actual amendment was at the time made by the formal drawing or service of such amended answer, although the judgment roll in this action contains what purports to be such amended answer. When it was first actually drawn is not explained. The question here arises whether the referee had power to order such an amendment. It seems plain that the referee exceeded his power. When the amendment was allowed there was no defense of the nature of a counter-claim contained in the issue which could be enlarged by such an amendment as was allowed, nor was it possible for the referee to allow such a counter-claim to be introduced in the answer, as it then stood, without permitting a substantial change of the defense. In effect, the amendment amounted to a new defense of a nature different to that contained in the answer, which it has often been held, is improper to be allowed on the trial either by a judge or a referee (*Ransom* agt. *Wetmore*, 39 *Barb.*, 104; *Johnson* agt. *McIntosh*, 31 *Barb.*, 272; *Walton* agt. *Bennett*, 16 *N. Y.*, 200; *Whitford* agt. *Hungerford*, 42 *N. Y.*, 185; *Ford* agt. *Ford*, 35 *How.*, 321). An amendment which proposes a new cause of action or defense should not be allowed.

There is ground for the supposition in this case that the amended answer, as it now appears on the judgment roll, was not prepared until after the decision and report of the referee. It is asserted by the plaintiffs' counsel that they never saw it till it appeared on file in the roll. Had it been competent for the referee to allow the defendant the privilege of making such an amendment, the answer should have been drawn and verified and served as amended. Then an opportunity to reply to it would have been afforded to the plaintiffs. Perhaps the statute of limitations or other reply would have been interposed to the counter-claim.

In *Johnson* agt. *McIntosh*, (*supra*), the referee admitted proof of a defense not asserted in the answer, and on motion, after trial, the special term allowed the answer to be amend-

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ed to cover the defense. But the judgment was reversed, and the amendment pronounced to be improper. So in *Woodruff* agt. *Dickie* (31 *How.*, 164), it was held that an amendment is the correction of some error or mistake in a pleading already before the court, and there must be something to amend by, whereas the insertion of facts constituting a new cause of action or defense would be a substantial pleading and not an amendment of an existing pleading. It was further said in that decision that there are no cases which furnish a satisfactory reason for holding such an amendment to be within the power of the court to grant. It was not necessary that Bainbridge should set up, by way of counter-claim, his supposed demand against the plaintiff. He was at liberty to bring a cross action for the same (*Peck* agt. *Minot*, 4 *Robts.*, 323; *Lignat* agt. *Redding*, 4 *E. D. Smith*, 285; *Gillespie* agt. *Torrence*, 25 *N. Y.*, 306; *Collyer* agt. *Collins*, 17 *Abb.*, 468). He elected to abandon and withdraw his counter-claim and to bring a cross action on his alleged demand. That action is still pending. After he had thus made his election it was not competent to allow a further amendment of the answer in the original action by re-instating the former abandoned counter-claim in an amended form while the cross action was pending. The law does not favor double vexation for the same cause of action (16 *Barb.*, 461; 2 *Duer*, 611; *Mills* agt. *Block*, 30 *Barb.*, 549; 15 *Abb.*, 191). That plaintiffs proceeded to move to set aside the referee's report for irregularity before the entry of the judgment. The order to show cause permitted the entry of the judgment without prejudice to the motion. It is, therefore, proper to consider on this motion the question of the power of the referee to allow the amendment without remitting the plaintiffs to an appeal from the judgment. I am clearly of the opinion that the referee had no power to make the amendment on which the enormous judgment in this case is founded, and that his report, for that reason, should be set aside.

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There is another ground of irregularity alleged. One of the plaintiffs states in his affidavit, that before the case was summed up, the referee came to his office and told him he should advise him to settle the case. He further states he came to him a second time, after the cause was summed up, and, in one or the other interview, mentioned the sum of \$35,000 as a proper sum to be paid the defendant by the plaintiffs. The referee himself has made an affidavit on the subject, in which he admits he called on Mr. Clews, but says it was upon another matter; that incidentally he spoke of this suit, and having been long acquainted with the firm of which said Clews was a member, and having been always on the most friendly terms with said Clews and his partner Livermore, made a remark in substance that he had not at all come to any conclusion about the case as yet, but that there were matters in evidence in the case which led him to believe that if he did give judgment for the defendant it would necessarily be for a very large amount, and he then suggested to said Clews that it might be well to think the matter over in that light, and, perhaps, it might be to their interest to settle it; that he has some recollection of mentioning some sum as having been discussed or spoken of by defendant's counsel, or some of them, and he thinks the sum was \$35,000; but if he did mention such sum, or any sum, as having come from the other side, and not originating with him, said referee. A referee should not attempt to exercise the functions of a negotiator. However honest his intentions or well-meant his endeavors, the failure of the attempt may be ground for the supposition that his subsequent judgment was, in some degree, influenced by it. The referee is a gentleman of high standing and character, and it cannot be supposed that, in fact, he has allowed his mind to be influenced by the refusal of the plaintiffs to yield to his suggestions of compromise. But it has been held that the same rule should be applied to referees as to jurors (*Gale agt Garmits*, 4 *How.*, 253). Whenever a juror has been guilty of

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an irregularity which gives any reason to suppose that either party has been prejudiced by it, the verdict will be set aside (1 *Hill*, 211; 1 *Cow.*, 221; 2 *Cow.*, 589; 3 *Cow.*, 355; 5 *Cow.*, 283). Courts have ever guarded with jealous watchfulness the right of litigants to the unbiassed judgment of the jury or the referee. It has been remarked that whenever it has been seen that by any means or influence beyond what has transpired on the trial and in the presence of the parties, the minds of the jury may have been influenced, their verdict will be set aside (*Dorlon* agt. *Lewis*, 9 *How.*, 4). What was said in that case is appropriate here, "a referee owes it to himself not only to avoid all improper influences, but even the appearance of evil." Whether satisfied with the decision or not, no one should be left for a moment to question its fairness. It is certainly unusual for a referee to receive the intimation from one party that \$35,000 is a "proper sum" to be paid to him by the other, and to be the bearer of the suggestion to the other side with the incitement "that it might be well to think the matter over," in the light of the prediction that if he did give judgment for defendants it would necessarily be for a very large amount. Whether the failure of the plaintiffs to comply with the suggestion of the referee had any influence upon his mind or not, it seems proper that a referee or jury should be delivered from the possibility of bias or temptation under such circumstances. An order will be granted vacating the judgment entered in this action, and setting aside the report of the referee for irregularity, and also discharging the order of reference.

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SUPREME COURT.

ALPHEUS CHAPMAN agt. SILAS ROSE.

The defendant, a farmer, at the request of one M., accepted the agency for the sale of a patent hay-fork. M. produced and signed a paper in duplicate purporting to state defendant's agency, and also a paper printed therewith, and attached thereto, purporting to be an order for forks. Defendant, relying on M.'s statement, signed the part and counterpart. M. left with defendant the counterpart with both their signatures.

The plaintiff, a broker, became holder of a part of one of the instruments which M. took away, and which turned out to be, not an order for forks, but a *promissory note* for \$270, purporting to have defendant's signature. The note was payable to M. or bearer, indorsed by him, and before maturity sold to plaintiff for \$25 less than its face. Defendant conceded that the signature looked like his, but denied that he ever made the note, and the plaintiff brought a suit upon it.

Held, a very clear case of fraudulent practice is made out on the facts against M., whereby the defendant's signature was obtained to a paper of a character which he did not intend to sign. Where the party sought to be charged by his signature shows that he never intended to put his name to any such instrument, that he was deceived as to its actual contents, and that he is not chargeable with laches, negligence or misplaced confidence, which is negligence; he will not be held liable, even to a *bona fide* holder, before maturity. There is no contract where there is no assent. Judgment for defendant.

Second Judicial Department, General Term, December, 1873.

THIS suit was brought by Alpheus Chapman, plaintiff, against Silas Rose, defendant, and tried at a circuit at Newburgh in November, 1871, before a jury. Hon. JOSEPH F. BARNARD, J., presided. The jury rendered a verdict in favor of the defendant, and against the plaintiff, for costs. W. Vanamee and Hon. Charles H. Winfield for plaintiff; Hon. W. J. Groo for defendant. On the trial it appeared that on the first day of February, 1871, a person representing himself as Alfred E. Miller came to the defendant, a farmer, at his barn in the town of Warwick,

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in this county, and asked him to take an agency for the sale of a patent hay-fork, which defendant finally consented to do. Miller then requested him to sign an agreement creating and accepting the agency, and also a printed order for one hay-fork, which was attached at the bottom. He also requested defendant to execute a duplicate of the agreement and order, which he did; and Miller took one, and defendant kept the other. It was understood that defendant was not to pay for any forks until he had actually sold them. This was all that passed between them. About seven months afterwards, defendant was notified by the plaintiff in this suit to pay a promissory note, purporting to be made by defendant February 1, 1871, for \$270, payable to Alfred E. Miller or bearer, seven months after date, and transferred to plaintiff before maturity. Defendant, although conceding that the signature looked like his, denied that he ever made the note, and the plaintiff brought a suit upon it. On the trial Judge BARNARD charged the jury that if they concluded that when Rose signed the orders, he did not intend to execute a note, as the transaction never called for one, it was not a note, and was never, at any time, valid in the hands of any party. The plaintiff appealed to the general term, where the judgment rendered against him was affirmed.

TAPPEN, J.—The defendant, a farmer, was accosted in his barn one day by a person calling himself Alfred E. Miller, on the subject of patent hay-forks, and before they parted, the defendant consented to accept an agency for the sale of the forks. Miller produced and signed a paper in duplicate purporting to state defendant's agency, and also a paper printed therewith, and attached thereto, purporting to be an order for forks. He asked defendant for his signature to the part and counterpart, and defendant signed both instruments, relying on the statement of the contents by Miller, and without reading, but yet scanning, one of the papers. Nothing was said by either party about a promissory

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note, and the transaction did not call for one. Miller took away one of the papers containing defendant's signature to the agreement for agency, and to the other writing or printing thereon, which Miller said was the order for forks. Miller left with defendant the counterpart with both their signatures. The plaintiff, a broker in Middletown, became holder of a part of one of the instruments which Miller took away, and which turned out to be, not an order for forks, but a promissory note for \$270, purporting to have defendant's signature. The note was payable to Miller or bearer. Miller indorsed it, and before maturity sold it to plaintiff for a price twenty-five dollars less than its face. A very clear case of fraudulent practice is made out on the facts against Miller, whereby the defendant's signature was obtained to a paper of a character which he did not intend to sign. He was told it was an agreement and order, that his signature was necessary, and that the papers were both alike; and he produced on the trial the papers which he and Miller signed, and which Miller left with him as an exact counterpart of the paper containing defendant's signature in two places, and which Miller took away. The plaintiff, who bought the note from the payee, did not make inquiry of the defendant about it, although he had ample time and opportunity between the 9th and 22d of February, during which period he was negotiating with Miller on the subject. He did, however, inquire as to defendant's responsibility at a bank in the neighborhood, where defendant was known.

The law merchant has been extended to all proper lengths for the protection of innocent holders for value of commercial paper not matured, but when the instrument is not commercial paper, that protection ceases. The term commercial paper may be held to include notes, bonds and securities saleable in the market. In *Foster agt. McKennon* (38 *Law Jour., R. N. S.*, 310), a recent case, the full bench of the English common pleas held that defendant was not liable under circumstances similar to, but not so strongly in favor

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of the defendant, as the circumstances in this case. And Mr. Justice BYLES remarks in the opinion, that the party sought to be charged never saw the face of the bill which had his indorsement; that its purport was fraudulently misdescribed; that when he signed one thing he was told and believed he was signing an entirely different thing, "and his mind never went with the act." And he distinguishes it from that class of cases when the party, "with knowledge," writes his name across or upon a paper which is fraudulently used or diverted. Where the party sought to be charged by his signature shows that he never intended to put his name to any such instrument; that he was deceived as to its actual contents, and that he is not chargeable with laches, negligence, or misplaced confidence, which is negligence, he will not be held liable even to a *bona fide* holder before maturity. The reason is that there is no contract where there is no assent, and it would be a perversion of terms to hold the instrument in question a contract with all the facts stated. It had neither life, inception, nor validity. A similar conclusion is reached in *Whitney agt. Snyder* (2 *Lands.*, 477), where a case is presented, quite similar in some of the facts, to the case at bar; and it is said that as to negotiable instruments, there are some defenses as to which a *bona fide* purchaser purchases at his peril.

Upon the authority of these cases the case at circuit was correctly tried, and the judgment for the defendant must be affirmed with cost.

Coleman agt. Van Rensselaer.

SUPREME COURT.

COLEMAN agt. VAN RENSSELAER.

A mortgage of property which contains no covenant or promise to pay the money secured by it, nor any express acknowledgement of indebtedness by the mortgagor, creates no *personal* liability.

It is enough to establish a personal liability against the mortgagor if the mortgage contain an *admission* of indebtedness on his part, then a promise will be implied and a legal liability created.

But all the cases held, however, that to create a personal liability by implication, the admission of indebtedness contained in the instrument must be express and unequivocal. It is only from such an admission that a promise will be implied.

The recital in an ordinary mortgage, "that the party of the first part, in consideration of the sum of five hundred dollars to him duly paid, has granted, bargained, sold, conveyed," &c., is not an admission of indebtedness from which a promise to pay the sum secured would be implied, hence no personal liability against the mortgagor was created thereby.

Saratoga Special Term, February, 1873.

POND & FRENCH, *for plaintiff.*

L. B. PIKE, *for defendant, Mrs. Van Rensselaer.*

BOCKES, *J.*—The action is for the foreclosure of a mortgage. The amount claimed to be due and secured thereby is \$500, with interest from May 1, 1871. The defendants are Mary F. Van Rensselaer, Jane A. Martyn, John Van Rensselaer, and Horatio N. Squires, all of whom make default except the first-named Mary F. Van Rensselaer. The equity of redemption is in the defendant Jane A. Martyn, who took title subject to the mortgage.

It is conceded that the plaintiff, as the case stands before me, is entitled to have the premises sold and the avails applied on the debt claimed in the complaint. But Mary A. Van Rensselaer defends with a view to escape liability for

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such deficiency as shall remain, if any, after due application of the avails of the sale of the mortgaged premises.

The issue before me is one between the plaintiff and Mrs. Van Rensselaer, and does not affect the case as regards the other defendants.

The complaint charges that Mrs. Van Rensselaer covenanted to pay the plaintiff the sum claimed, and mortgaged the premises as security for such payment.

In her answer Mrs. Van Rensselaer denies that she covenanted or promised to pay the debt; sets up that the debt was not her debt, but was the debt of John Van Rensselaer, her husband; the mortgage was given as collateral security therefor; and, further, sets up payment as to part of the debt and an extension of the time of payment, without her consent, of the balance.

The issues thus presented are: 1st, As to Mrs. Van Rensselaer's personal liability; and 2d, as to the payment of part with an extension of payment of the balance.

First. Did Mrs. Van Rensselaer covenant to pay the debt? or, in other words, does the mortgage contain a personal obligation on her part to pay the amount secured by it?

The proof shows that the debt was not her debt, but was the debt of her husband, and that the mortgage was upon her individual property as security for his debt. It is insisted, however, that she is bound personally to its payment by the term and legal import of the mortgage.

A mortgage of property which contains no covenant or promise to pay the money secured by it, nor any express acknowledgment of indebtedness by the mortgagor, creates no personal liability (3 N. Y., 264; 41 N. Y., 201, 207, 208, 14 Barb., 242; 13 Barb., 63-73; 15 Wend., 218; 10 Johns., 56-7). These cases contain but the reiteration of the rule laid down in others cited in 3 N. Y., 264; Cro. Jac., 281; 2 Modern, 36; 6 Blackf., 161; 7 Watts, 360; 2 Munf., 337. The mortgage in this case contains no covenant or promise in terms to pay on the part of Mrs. Van Rensselaer,

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but it is enough to establish a personal liability against her if it contain an admission of indebtedness on her part, then a promise will be implied and a legal liability created. All the cases hold, however, that to create a personal liability by implication the admission of indebtedness contained in the instrument must be express and unequivocal. It is only from such an admission that a promise will be implied. The plaintiff's counsel insists that such express admission of indebtedness is found in the case in the statement or recital in the mortgage, "that the party of the first part, in consideration of the sum of five hundred dollars to her duly paid, has granted, bargained, sold, conveyed," &c. But it will be seen that in the early case of *Suffield* agt. *Baskeroil* (2 *Modern*, 36), the instrument sued on contained a similar recital, to wit: "That the defendant for and in consideration of four hundred pounds, lent him by the plaintiff, granted," &c., yet it was held that the defendant was not personally liable.

In *Howell* agt. *Price* (1 *Piere. Will.*, 292) the mortgage recited a consideration of three hundred pounds, in considering which the lord chancellor said: "There did not appear to be any contract, either express or implied, for the payment of this mortgage money;" and when the case was subsequently again considered, he added in substance that the remedy of the mortgagee would be against the premises on default of payment. It is true the question of personal liability was not directly up in the case.

In *Salisbury* agt. *Philips* (10 *John.*, 57) the action was on an instrument made real, the recital in which was as follows: "For and in consideration of the sum of twelve pounds to me in hand paid by Abraham Salisbury, I do hereby assign over to him and his assigns forever all the estate," &c. It was held that there was no personal liability. I understand, too, although it is not expressly so stated, that there was a similar recital in the instrument considered by the chancellor in *Hone* agt. *Fisher* (2 *Barb. Ch.* 560), wherein he held in

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accordance with the above cases, and cites 1 *R. S.*, 73S, § 139, which provides that no mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured, and that when there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage.

In *Vrooman* agt. *Dunlap* (30 *Barb.*, 202), the mortgagor was sought to be personally charged with the deficiency after sale of the mortgaged premises. There was no bond or separate personal obligation given to or accompanying the mortgage. It was held that there was no personal liability of the mortgagor. I infer the mortgage was in the usual form as regards the recital of a consideration. Here, too, the mortgage was given as security on the purchase by the defendant of the mortgaged premises.

In *Severance* agt. *Griffith* (2 *Lansing*, 3S) the mortgage was not accompanied by any bond or personal security; and, as may be fairly assumed, was in the usual form as regards the recital of a consideration. The court remarked that the mortgagee had no remedy against the mortgagors personally; that the remedies he had were against the lands mortgaged.

In *Weed* agt. *Covill* (14 *Barb.*, 242) the action was on a chattel mortgage, which recited that for the consideration of one dollar, and to secure the payment of one hundred and ten dollars, it granted, &c. The question arose on demurrer to the complaint. It was held that there was no personal liability, not even for the one dollar. The court, per HAND, J., says there was no recital or declaration in the instrument that the defendant was personally indebted to the plaintiff, therefore no implied covenant to pay anything. It is merely a mortgage without personal liability.

In *Culver* agt. *Sisson* (3 *N. Y.*, 264), two of the cases above particularly considered are cited with approval, to

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wit: *Suffield* agt. *Baskeroil*, and *Salisbury* agt. *Philips*, in each of which the instrument sued on contained a recital similar to that relied on in this case to establish a personal liability.

And in the very recent case of *Turk* agt. *Ridge* (41 N.Y., 201-207), those cases again receive the approval of the court of appeals, as does also *Weed* agt. *Covill* (14 Barb., 242).

It seems settled on authority, therefore, beyond peradventure, that a recital in a mortgage like that contained in the mortgage in this case was not an admission of indebtedness, from which a promise to pay the sum secured would be implied; hence that no personal liability against the mortgagor was created thereby.

In many of the cases cited, too, the debt secured by the mortgage was the debt of a mortgagor. Not so in this case. Here the debt, to secure which the mortgage was given, was the debt of another party.

I should not have deemed it necessary to examine these cases thus minutely, were it not that I am cited to the case of *Chase* agt. *Ewing* (51 Barb., 597) as an authority, to the effect that the recital as to the consideration in the mortgage in this case, was such an admission of indebtedness as created a personal liability against the mortgagor. Now, Judge JOHNSON was here examining the question whether the mortgage was an evidence of indebtedness, with a view to determine whether it passed under the clause of a will disposing of choses in action thus denominated. The mortgage was undoubtedly an evidence of indebtedness. So is the mortgage in this case. In law it falls under that denomination. As Judge JOHNSON says: "That it is an evidence of indebtedness, seems too clear for argument."

Every mortgage, whether it contain a personal liability clause or not, is an "evidence of indebtedness;" is a chose in action. It gives a right of action in case of default in the condition; to be enforced, however, against the property mortgaged only in case of the absence of personal liability.

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In *Howell* agt. *Price* (*supra*), where the lord chancellor said there was no personal liability, it was further remarked that the three hundred pound mortgage money was a debt; "a debt of a special nature, and for which there was a particular remedy," alluding to the remedy against the premises (see also *Rice* agt. *Rice*, 4 *Pick.*, 349).

Now, all that was decided in *Chase* agt. *Ewing*, was that the mortgage came within the denomination of "evidence of debt," as that language was employed in the clause of the will there under examination.

It was not there decided that the usual recital in a mortgage, as to consideration, which is generally inserted to uphold the grant which follows it, was an admission of indebtedness, creating a personal liability against the mortgagor. If the case did so hold, the decision would be flatly in conflict with the cases above cited, and manifestly unsound. The cases above examined, both in the English and American courts, including those in the court of last resort in our own state, where these cases have received direct and unmistakable sanction, are flatly against such ruling. But the case, as I conceive, does not go the length claimed, and the recital urged upon my consideration and above examined, does not impart an admission of indebtedness creating personal liability.

Nor is there any other recital or statement in the mortgage amounting to such an admission. Stress is placed on the condition in regard to the payment. It is, however, the usual condition in form. The language is, "this grant is intended as security for the payment of five hundred dollars and interest," &c. The condition is very much the same as in the mortgage under examination in *Severance* agt. *Griffith* (2 *Lans.*, 38), and does not differ materially from those contained in other mortgages in the cases above examined.

It is further stated that a policy of insurance was assigned also as security; but this is nothing more than a pledge in addition to the land, even if it be conceded that the policy

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was one issued to the mortgagor. It is of no more significance, certainly, than was the covenant of warranty to defend the title to the property in the case of *Weed agt. Covill (supra)*. Then there is the usual clause in regard to the possibility of a surplus after sale providing that such surplus, if any, shall be paid to the mortgagor. This is no admission of indebtedness, and who but the mortgagor should have this surplus if any there should be? I am entirely satisfied that the mortgagor is not personally liable on this mortgage, and the relief demanded of a personal judgment against the mortgagor must be denied.

Second. The conclusion at which I have arrived on the point above considered renders the examination of the remaining issue, as to payment of part of the debt and an extension of the time of payment of the balance without the mortgagor's consent, wholly unnecessary. Mrs. Van Rensselaer, having parted with the equity of redemption, has no interest in the controversy except to escape personal liability.

If, however, the testimony of Mr. Van Rensselaer be credited, the defense on this issue is established. Where a wife mortgages her separate property as security for her husband's debt, her position is that of surety, in which case, if there be an extension of the time of payment without his consent, the mortgage is discharged (*Bank of Albion agt. Burns* (46 N. Y., 170)). But an examination of this branch of the case is unnecessary.

The plaintiff is entitled to the reversal of the judgment of foreclosure and sale of the mortgaged premises, none of the defendants having answered except Mrs. Van Rensselaer, who, as is proven, had conveyed the equity of redemption to the defendant Martyn.

The plaintiff, too, should have costs, as in case of failure to answer, except as against Mrs. Van Rensselaer, who is entitled to costs of the action on her part against the plaintiffs.

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COURT OF APPEALS.

WILLIAM HUBER, plaintiff in error, agt. **THE PEOPLE**, defendants in error.

The act of 1870 (*ch.*, 383), known as the (New York) City Tax Levy Laws, providing and authorizing the *court of special sessions* of that city to be held by less than two police justices, is *unconstitutional and void*.

Therefore, all criminals convicted and sentenced in that court by one justice are entitled to be discharged.

Argued February 29, 1872; decided March 27, 1872.

HENRY WEHLE *for plaintiff in error.*

A. S. SULLIVAN *for defendants in error.*

ALLEN, J.—The conviction of the plaintiff in error of the offense of petit larceny, in the court of special sessions, in the city of New York, held by a single police justice, is sought to be sustained by a provision of the act of 1870, known as the city tax levy laws of 1870 (*ch.*, 383). It is conceded that if, for any reason, that act was invalid, and does not authorize such court to be held by less than two justices, the court was not properly constituted, and the conviction must be reversed.

Prior to 1865, the court of special sessions in New York was held by any three of the police justices of that city, and could not be held by any less number (*Laws of 1858, ch.*, 282, § 8; *in re Devine*, 21 *How.*, 80).

In 1865 the court was authorized to be held by the two police justices elected to the second and sixth judicial districts of the city, with power in the governor, in case of

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the death, removal from office, or resignation of either of said justices, to designate one of the other police justices of the city to hold said court; and in case of the sickness or disability of either of the said two police justices, it was declared to be lawful for the other to hold said court (*Laws of 1865, chap. 563*).

In 1870 the act of 1865 was repealed, and all acts and parts in force at the time of the passage of the said act, relative to said court of special sessions, repealed and re-enacted, and declared to be thenceforth in full force and effect (*Laws of 1870, chap., 30*). The city tax levy act was subsequently enacted by the same legislature (*Laws of 1870, chap. 383*). The forty-ninth section of the latter (*S. L., p. 917*) declared that the court should be held by two police justices of the city, to be designated by the mayor, and in case of any disability of either of the two police justices to hold court, it was declared to be legal for the other to hold it while such disability continues. The acts passed in 1871 (*ch. 302 and 438*) do not affect the question before us. They did not change the constitution of the court, except as they conferred power upon the mayor to designate a judge to hold the court in case of the sickness or disability of the police justices.

By chapter 30 of the laws of 1870, the act of 1858, constituting the court of special sessions in the city of New York, was repealed, not simply as the legal result of the repeal of the law of 1865, but it was in terms repealed and re-enacted as the law in force, and at the time as of the passage of the revivor. The only question, then, is as to the validity of the provision in chapter 383 of the laws of 1870, recognizing and reconstituting the court.

The constitutional prohibition upon the legislature in respect to private and local bills, has come so often under review, and its purposes and objects, as well as its operation and effect, been judicially declared, that nothing remains but to apply the principles of the adjudications, and give effect

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to plain intent of the provisions as they come. It is declared that no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title. This is absolute, and every act and part of an act passed in disregard of it, is void. The enactment is not merely directory, to be obeyed or not, as the legislature may think proper, but is mandatory, and a compliance with it is necessary to the validity of any act coming within its lines (*People agt. Hill*, 35 N. Y., 449; *People agt. Supervisors of Chataqua*, 43 N. Y., 10).

The constitutional prohibition includes all acts, whether local or private; and if either local or private, the requirements must be complied with (*People agt. Allen*, 42 N. Y., 378).

If a bill is local in its operation and effect, although public in its character, it is within the constitutional enactment. The provision in the act of 1870 was public, as it concerned the administration of the criminal laws, and the trial and punishment of offenders; and provided for the organization and construction of a court of criminal jurisdiction; but it was local, inasmuch as it related to a court peculiar to the city of New York, with jurisdiction only co-extensive with the limits of that city, and with officers connected with its boundaries. An act regulating the duties of a public officer, under the general laws of the state, if limited in its operation to a part of the state, or to a single county, is local, and must be passed in the form prescribed by the Constitution, although the subject matter of the enactment is public and affects public interests (*Gaskin agt. Meek*, 42 N. Y., 186; *People agt. O'Brien*, 35 N. Y., 193). The act in which the section relating to the organization of sessions in New York, is found is a local act in all its parts, and is in no respect, or in any of its provisions, general, although all its provisions are public. This section does not differ from other parts of the act. In this respect the act is such as is annually passed by the legislature, and is known as the City Tax Levy. A

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similar act is annually passed for the county of New York, known as the County Tax Levy. The one is entitled "An act to make further provision for the government of the county of New York," (*laws of 1870, ch. 382*). The other, that under consideration, "An act to make further provision for the city of New York," (*laws of 1870, ch. 383*.) The purpose and object of each is to provide for the expenditures of the city and county governments respectively; they direct the levy of taxes and make provision for the disbursements for the sums raised; the titles of the acts are apt and expressive of their purpose and object, indicating clearly that they are revenue acts—acts providing ways and means for the support and carrying on of the government of the city and county as organized; the title of the act does not indicate an intent to change the forms or alter the character of the city government in any way, or to amend the charter, when the legislature intend that the title expresses the intent and characterizes the act (*See Laws of 1870, ch. 127; Laws of 1871, chaps. 573, 574*). To provide, is to procure beforehand for future use, to furnish, to supply, to procure supplies, or means of defense; and to make provision, is to provide means or supplies. The merchant makes provision for his bills, by putting the drawer in funds to pay them. Provision is made for the poor, by raising moneys for their support. Provision is made for the government, by placing at its disposal the ways and means for the payment of its officers and its necessary expenses. It would do violence to language to hold, that an act to make provision for the city government was an act to create, to reorganize, or to change the government, or its organic law, in any respect.

The very words recognize a city government as in existence, for the support of which provision is to be made. The governmental organization, as it exists, is to be provided for, by supplying it with the proper means for its necessary disbursements and expenditures. The organization of the court of sessions, anew in the city of New York, had no connec-

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tion with the provision for the government of the city contemplated by the title of the act, and the section designed to accomplish such re-organization was, therefore, void. It is to be regretted that the result of this conclusion may tend to inconvenience in the discharge of some who are undergoing the punishment due to their crimes, but it is the right of all to have the law declared as it is, whatever may be the consequence, and a greater evil to allow a practical abrogation of a plain, constitutional requirement, by yielding to a supposed necessity. The tendency, and the natural tendency of legislation is to make certain acts receptacles for enactments of all kinds, especially for such as might not meet with favor standing by themselves. The object of the Constitution was to prevent this, and full effect should be given to its language and salutary intent. The judgment of the supreme court and of the special sessions must be reversed

SUPREME COURT.

HENRY S. KIERSTED and another, respondents, agt. THE ORANGE AND ALEXANDRIA RAILROAD Co. and others, appellants.

An order granted on terms upon an application to show cause why the defendants should not have thirty days in which to make and serve a case, after default, is not appealable.

New York General Term, March, 1873.

Before D. P. INGRAHAM, Ch. J., and N. DAVIS, J.

ON an application made for an order to show cause why the appellants should not have thirty days in which to make

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and serve a case after default, the same was granted at the December special term, 1872, by Hon. WM. H. LEONARD, on condition that the appellants file an undertaking on appeal, as required by law, to stay execution.

From this order an appeal was taken to the general term.

J. C. JACKSON, *for appellants.*

T. C. CRONIN, *for respondents.*

INGRAHAM, *Ch. J.*, held that the order was in the discretion of Justice LEONARD. That the appellants obtained the time in which to make their case, and the judge had the right to impose the condition of an undertaking on appeal even if the appellants did not ask for a stay of execution. That though the time, in which to make a case had not expired, the court could grant the extension on terms, but where the time had expired the appellants were asking to be relieved of a default and for a favor, and the order granting the favor on conditions, being a discretionary one, could not be appealed from.

That the parties appellants consisted of five foreign railroad corporations, without property in this state, as appeared before Judge LEONARD, and on asking for the favor of continuing litigation in the courts of this state, it could not be said that any abuse of discretion was exercised by requiring of them that they give security on appeal. That the order was not an appealable one, and must be affirmed with costs.

Order affirmed.

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SUPREME COURT.

BENONI S. PARTRIDGE, appellant, agt. JANE STOKES and
others, respondents.

Where a *gift* of money is made by the husband to his wife, while he is indebted to various creditors, the statute declares such gift *fraudulent* as to those creditors. Where the plaintiff, after having obtained judgment personally against the husband for some \$1,100, upon which execution had been issued and returned unsatisfied, commenced an action against both husband and wife in the nature of a judgment creditors' bill, to reach money, claimed to have been fraudulently received by the wife as a gift from her husband, and to have been used by the wife upon her real estate, and it appeared in evidence, by the admissions of both husband and wife, that he had, some time previously, given his wife \$500, and, perhaps, more; that no accounts had been kept between them; but she stated that she had paid back to her husband, at different times, as much as she had received from him. And it also appeared that about that time the wife—within about a month—had deposited to her credit, in a savings' bank, something over \$3,000.

Held, that the loose and unsatisfactory evidence of the defendants can not be allowed to cover up the dealings between the parties engaged in defrauding the creditors of either or both, especially where, as in this case, a fraudulent intent was fully proved.

It is well settled that where a conveyance is executed with intent to defraud creditors, it is void not only as to existing, but as to future creditors.

Fourth Department, General Term.

Argued at Rochester, September 11th, 1872.

Decided at Syracuse, December 6th, 1872.

THIS action was tried before Hon. Henry Reigel, as sole referee, who reported in favor of the defendants, and the plaintiff appealed from the judgment entered upon the report of the referee to the general term of the fourth department.

The facts, so far as they relate to the points passed upon by the general term, are sufficiently stated in the opinion.

Partridge agt. Stokes.

IRVING G. VANN, *for appellant.*ISAAC D. GARFIELD, *for respondents.*

By the court, MULLIN, P. J.—This action is in the nature of a creditor's bill to enforce a judgment for \$1,168 50, damages and costs, recovered by the plaintiff, against Robert Stokes, in this court, on the 24th day of September, 1868, against the property of Jane Stokes, the wife of said judgment debtor, after execution returned wholly unsatisfied.

I do not propose to examine any of the evidence in the case except what related to an amount of money which Robert Stokes made during the rebellion in procuring volunteers for the army. Stokes admits that he received during the last two years of the war between \$2,000 and \$3,000 in the business of obtaining volunteers, and of this sum, \$500 were given by him to his wife, and were used by her in her business or in erecting houses on lands owned by her in the city of Syracuse.

He says, "I think I might have given her \$500 of it, perhaps a little more or a little less—it may have been a good deal more or a little less; my wife may have paid it toward the houses she owns."

The wife testifies: "I never had any other money given me except about \$500 at the time of the war, when he, her husband, was putting in substitutes * * * * My husband may have given me more than \$500; we never have kept any accounts."

Stokes also says that he kept no account of what he gave his wife; that he might have given her over \$500; that he cannot tell the amount that he did let her have.

The treasurer of the Syracuse savings institution testified that on the 11th day of February, 1864, there was deposited to the credit of Jane Stokes, \$1,700, and on the 24th day of March following, \$1,400.

There were deposited after that sums varying from \$100

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to \$800. The last entry was on the 11th day of June, 1869.

It does not follow that the \$1,400 and the \$1,700 above mentioned came from Robert Stokes, but when the parties who received and paid the money, and who were in moderate circumstances, are wholly unable to specify the amount received by the wife, and it appears that Mrs. Stokes received about the amount so deposited, it throws upon the defendants the burthen of proving how much was received by the wife, or the presumption legitimately arises that she received at least the \$500.

When Mrs. Stokes received the money her husband was indebted to divers persons in small sums, but not to the plaintiff. The statute declares the gift to the wife fraudulent, as against those creditors.

The fraudulent intent was proved by several witnesses, one of whom only was impeached or contradicted.

It is well settled that when a conveyance is executed with intent to defraud creditors, it is void, not only as to existing, but as to future creditors (*King agt. Wilcox*, 11 *Paige*, 589; 1 *Story, Eq.*, § 361; *Case agt. Phelps, &c.*, 39 *N. Y.*, 164).

The referee was wrong in holding the dealings between husband and wife not fraudulent, unless the money was paid to her by way of loan, and it has since been repaid by her.

A loan is not presumed. It was a gift pure and simple. Although it was a gift, a redelivery of the money to the husband would probably relieve her from the imputation of fraud, under which she would otherwise rest, and for which fraud she would be liable to her husband's creditors.

But there is no evidence that any such thing was done, or intended to be done.

Both say she has paid in fines, and for him, as much as she has received; but they have kept no account of what

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was thus paid, if the payment could be applied as a return of the gift.

It will not do to allow such loose and unsatisfactory evidence to cover up the dealings between the parties engaged in defrauding the creditors of either or both.

It cannot be said, with any degree of certainty, that the wife has actually paid back \$100. Although these parties are illiterate, they cannot be relieved altogether from the duty of showing, with reasonable certainty, the precise extent and nature of their dealings, when such dealings are subjects of investigation.

It would not be tolerated that when a debtor, intending to defraud his creditor, sells his property to another, that payment of the purchase money could be proved by such evidence as was given in this case. For the purchaser to say, I paid the price, but I cannot tell when or how, or in what sums, would not be received as evidence which would justify a court or jury in finding the fact of payment.

On another trial more reliable evidence may be given, that will relieve the defense from the suspicion that is cast upon it by the testimony of the defendants.

The judgment is reversed, and a new trial ordered; costs to abide the event, and the order of reference to be vacated.

TALCOTT and SMITH, *JJ.*, concurred.

Anchor Life Ins. Co. agt. Pease.

SUPREME COURT.

THE ANCHOR LIFE INSURANCE COMPANY appellant, agt.
ROGER W. PEASE, respondent.

Where a *general agent* of a life insurance company, under an agreement with a physician, *issued* a policy of insurance to the latter, whereby the physician agreed to pay a certain sum (\$284 35) annually, as premium, for ten years, upon the condition that said agent employ the assured as an examining physician for the company, and that the services of the physician should be paid by such premium: and it appeared, on the trial of the action by the insurance company against the physician, to recover the first premium note of \$284 35 that the agent had no authority, by his agreement with the company or otherwise, to make such an agreement for insurance, and as the company had never, in any manner, ratified the same, the policy of insurance was invalid and the premium note void.

The transaction was not an ordinary one which would come under the general powers and duties of a general agent, but an extraordinary one requiring specific authority.

Fourth Department, General Term.

Argued at Rochester, September 19, 1872, and decided at Syracuse, January 3, 1873.

Before MULLIN, P. J., TALCOTT & SMITH, JJ.

THIS action was brought upon a promissory note, of which the following is a copy:

“ \$284 35.

Syracuse, May 20th, 1870.

“ One year after date, without grace, for value received, I promise to pay to the Anchor Life Insurance Company, at office at Syracuse, \$284 35 with interest. The consideration for this note is the first annual premium on policy No. 2S12, issued by said company on the life of R. W. Pease; and it is hereby understood and agreed that unless this note shall be paid at maturity said policy shall be void, but this note shall be of full force and effect; and in case of the death of said assured before the maturity of this note, then the

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amount of this note shall be deducted from the amount of said policy upon payment thereof. R. W. PEASE."

At the time of the delivery of said note by the defendant the plaintiffs issued their policy of insurance, whereby, in consideration of the payment to them of the sum of \$284 35 annually, for ten years, they agreed to insure the life of the defendant for \$5,000. Said policy contained, among other stipulation, the following :

"The premiums shall be paid in cash, only on the production of receipts signed by the president or secretary. The president and secretary of the company are alone authorized to make, alter, or discharge contracts, or to waive forfeitures." Said policy was signed by Cantine & Bliss, general agents. At the time said note was given Cantine & Bliss were the agents of the plaintiff at Syracuse. Mr. Cantine was sworn for the defendant, and stated that the authority of his firm to act for the plaintiff was in writing; that he had power under his employment by the plaintiff to employ examining physicians, subject to plaintiff's approval. The plaintiff objected to this evidence on the ground that the agents' authority was in writing, and that the writing should be produced; but the referee overruled the objection.

The defendant, then, introduced in evidence, under objection, the following letter :

"Agency Anchor Life Ins. Co., Syracuse, Aug. 2, 1870.

R. W. Pease, M.D.—Dear Sir : We send in our report to-day, and need a voucher for the premium on your policy No. 2812, Anchor Life. We have made the note to run six months, and as we expect to give our attention to Syracuse for the present, we shall probably cancel the voucher, by medical examinations, in a short time. You will notice that we have stipulated that medical examinations shall cancel the amount of premium. We have called twice or three times to-day, but found you out. Please return the voucher by the bearer. Yours, &c., CANTINE & BLISS, Managers."

Cantine swore that he wrote said letter without the

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knowledge or authority of the plaintiff and that he had no authority to contract for the plaintiff to take premiums in medical services. The defendant swore that he was employed by Cantine & Bliss as examining physician for the plaintiffs and that he received the letter before he executed the note.

The referee, before whom the case was tried found the following conclusions of law; "1st That the said defendant having no notice or knowledge of the actual authority of the said agents had the right to deal with them as to any matter within the scope of their apparent authority.

2d. That said agents having actual authority to employ medical examiners, for said plaintiff might lawfully contract to pay them for their services in insurance premiums instead of money:

3rd. That the contract to receive pay for the said note in the services of the said defendant as medical examiner for said plaintiffs is a valid and binding contract on said plaintiffs, and is a defense to this action. The plaintiffs appealed from the judgment entered upon said report to the general term.

IRVING G. VANN, *for appellant.*

H. L. LEAVENWORTH, *for respondent*

By the court, TALCOTT, J.—This is an action on a note given by the defendant for a premium on a policy of insurance on his life, issued by the plaintiff. George A. Cantine and one Bliss were agents for the plaintiff at Syracuse. They had employed the defendant, who is a physician, as an examining physician and surgeon for the plaintiff. The note purports to be payable in cash. The referee however finds upon the evidence that the plaintiff applied to the defendant through their said agents for an insurance upon his life for the benefit of his wife, for the sum of \$5,000, and that the defendant then and there entered into a contract with the

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plaintiff through their agents aforesaid whereby the plaintiff agreed to insure the life of the defendant for \$5,000, and in consideration thereof the defendant agreed to pay the plaintiff the sum of \$284 35 annually for ten years in his fees as a medical examiner for the plaintiff and that upon the said agreement the policy was issued.

He also finds that the note in suit was made by the defendant upon the same agreement stated in writing by the plaintiff. The fact is, that the agreement was made by the Syracuse agents without the knowledge of the other officers of the plaintiff.

It was proved that the authority conferred upon the agents was in writing and it was objected that it should be produced or notice to produce it given. The referee, however overruled the objection and the defendant undertook to prove the authority by the parol testimony of Cantine, the agent. On his direct examination he testified that he was authorized to employ an examining physician, subject to the approval of the plaintiff. But on his cross-examination he testified that he was not in anyway authorized by the plaintiff to make such a contract as the referee has found. The policy signed by the president and secretary, and which the referee has found was delivered to the defendant simultaneously with the making of the note, contained a provision that the premiums should be paid in cash and the further provision that the president and secretary of the company are alone authorized to make, alter or discharge contracts.

The referee has found the contract to be valid and binding on the plaintiff, on the ground that Cantine & Bliss acted as general agents of the company at Syracuse and so held themselves out, with the knowledge and consent of the company and upon the ground that the defendant had no notice of any limitation of the agent's authority. In this we think the referee erred. A party dealing with a general agent has a right to presume, in the absence of any knowledge of his actual powers, that he possesses the ordinary

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powers of such agent. The contract, which the agents in this case assumed to make, was of an extraordinary character, not shown to have been customary or within the scope of the powers of such agents and it cannot be presumed to have been a customary contract, usually made by such agents, especially in the face of the direct provisions to the contrary contained in the policy delivered to the defendant as a part of the transaction. The plaintiff has never ratified the contract after a knowledge of its terms, but in fact repudiates it. The judgment for the defendant is therefore correct as both the policy and the note are ineffectual and invalid for want of power in the agent to make such a contract, in the absence of any valid ratification by the principal, and the conclusions of law of the referee that the contract is valid and binding upon the parties, which would give effect to both the policy and the note to pay in medical examinations, must be reversed.

Accordingly the first, second and third conclusions of law of the referee are reversed, but the judgment appealed from is affirmed.

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SUPERIOR COURT.

AMASA SPRING agt. JAMES DAY, impleaded, &c.

A trial fee of \$30 is taxable on the first and second trials each, where the jury *disagreed* on the first trial, but found a verdict for defendant on the second.

A charge of \$15 for services after notice and before trial, not exceeding five term fees, is also taxable for each trial.

Also a fee of 10 is properly allowed where more than two days were occupied at each trial, for such trials.

A charge for stenographer's fees for copy minutes of the first trial is not allowable.

Special Term March, 1873.

Motion for retaxation of costs.

DE WITT C. BROWN, *for def't. Day, for the motion.*

NATHANIEL NILES *for plff. opposed.*

VAN VORST, J.—This action was first tried at the May term, 1868. The jury disagreed. A second trial was had at a trial term in January, 1873, which resulted in a verdict for defendant Day, each trial occupied more than two days.

Defendant claims as costs a trial fee of thirty dollars for each of the terms, also fifteen dollars for proceedings after notice of, and before each trial.

A trial fee of thirty dollars is allowed for "every trial" of an issue of fact (*Code* § 307, *Sub. 4*).

This clearly warrants a trial fee, although the jury should disagree, and also a second fee on a subsequent trial (*Hamilton agt. Butler*, 30 *How.*, 36).

Subdivision 2 of same section allows for all proceedings after notice of, and before trial fifteen dollars. After the jury had disagreed on the first trial, the defendant was

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obliged to renote the case for trial, and go through the same proceedings preparatory to the second trial, that he had for the first. He was obliged to have the case put on the trial calendar, to subpoena his witnesses, and otherwise to make adequate preparation for the trial. A second charge of fifteen dollars for services before trial is clearly allowable. "Not exceeding five term fees" in all, are allowable notwithstanding second trials be had.

Each trial having occupied more than two days ten dollars additional for each trial should be allowed (*Subdivision 4 of § 307*).

The charge for stenographer's fees for copy minutes of the first trial is not taxable (*Hamilton agt. Butler, supra*).

In support of this item it was specially alleged by the defendant's counsel that the testimony of a witness given on the first trial, the witness having in the meantime died, was necessary for the second trial, and that it was stipulated between the attorneys of the parties that his evidence should be read on the second trial from the stenographer's notes taken on the first.

But the attorney for the plaintiff makes affidavit that this evidence was read from a copy of the minutes which he had obtained and for which he had paid. In such case the defendant cannot be allowed for a copy of the minutes as a disbursement.

The affidavit of the travel and attendance of witnesses was sufficient and the fees were improperly deducted by the clerk.

There must be a readjustment of the costs. The clerk will deduct five term fees, \$50 : stenographer's minutes, \$14 : and allow the other items in the bill of costs presented.

Eastwood agt. McNulty.

COMMISSION OF APPEALS.

**CHARLES W. EASTWOOD and HENRY A. NICHOLS, plaintiffs
and respondents, agt. JAMES McNULTY and JAMES
MERRITT, defendants and appellants.**

As between partners there are no profits until all losses and expenses are paid, no matter what the respective interests of the partners may be. Profits and losses, how ascertained on dissolution of a firm, and co-partnership articles in reference thereto, how construed.

Argued September 23, 1871.

Decided January Term, 1872.

APPEAL from a judgment of the general term of the supreme court of the first department, affirming a judgment entered on the report of John T. Hoffman, referee, in favor of the plaintiffs and against the defendants, for \$4,572 96. The action was for an accounting upon the dissolution of a firm in which the respective parties were partners. The co-partnership articles contained two articles in reference to profits and losses, the 7th and 10th, as follows:

“VII. The parties hereto shall bear and share the expenses and the losses, if any, of said firm equally, share and share alike.”

“X. Upon the dissolution or termination of the co-partnership, the property, assets, and effects thereof, shall be applied and divided as follows: The debts of said firm shall first be paid, then the capital contributed by each partner, with all interest due thereon, shall be paid in full, if there be sufficient for that purpose, and if sufficient, then the said assets, property, and effects, shall be applied to the payment of said capital and interest rateably, share and share alike;

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and after the payment in full of said debts and capital, the balance, residue, and remainder, being the net profits of said firm, shall be divided as follows: One-half of said net profits or balance, being fifty per cent. thereof, and hereby understood and taken as representing the services, skill, care, and attention of said partners about, in, and to the business of said firm to be equally divided between said partners, share and share alike, and the other half, or fifty per cent. of said balance or net profits to be divided as follows, said one-half or fifty per cent. being hereby taken and understood as representing the capital to be contributed by said co-partners to said concern: To said Charles W. Eastwood, five 83 $\frac{1}{100}$ per cent. or five 83 $\frac{1}{100}$ dollars of every fifty dollars, and to each of said other co-partners, McNulty, Merritt & Nichols, fourteen 72 $\frac{1}{100}$ per cent., or fourteen 72 $\frac{1}{100}$ dollars of every fifty dollars of said one-half profits or balance, provided, however, and it is hereby expressly understood and agreed by and between the parties hereto, that should either partner make default in contributing the capital so as aforesaid agreed to be contributed by him, and at or within the time or times agreed as aforesaid, the portion or share of said partner or partners so making default in said one-half or fifty per cent. net profits, representing said capital as aforesaid, shall be paid to and divided among such partner or partners as shall not make default in the payment of his share or portion of capital within the time so agreed upon as aforesaid, said profits to be divided as often as there shall be sufficient accumulated for that purpose."

DAVID MCADAM, *for appellant.*

S. F. FREEMAN, *for respondent.*

HUNT, *Comr.*—As an original question of book-keeping, the plaintiffs are in the right.

There are no profits until all losses and expenses are paid. No matter what the proportions may be in which the part-

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ners are to share in the profits, or to bear the losses; the losses and expenses on the one side, and the gains on the other, are first to be compared. If the gains exceed the losses and expenses, it is a case of profits, and profits are to be divided among the partners in the proportion agreed upon. If the losses and expenses exceed the gains, it is a case of loss, and the balance is to be borne by the partners as agreed upon. In each case the one side of the equation must be first deducted from the other, and the residue remaining is the subject to be disposed of.

The defendants insist that in this case there is a special agreement that the losses and expenses are to be borne equally by the parties. These losses and expenses, they then insist, must be deducted preliminarily, and paid one fourth by each partner and the residue only is subject to disposition under the articles of copartnership.

I cannot agree to this argument. I do not think the parties intended their agreement to be so construed. The seventh article and the tenth are to be construed together. If they are not in entire harmony, the latter must prevail, when the question arises upon a dissolution, as it does at this time. If there is any force in the defendants' argument, the seventh section is applicable to cases arising while the business is in progress. Thus, on the first day of May, it is ascertained that the firm has lost \$1,000 by the dishonesty of a clerk, or the failure of a debtor, or that they have been compelled to pay \$1,000 of duties on their importations. The defendant, McNulty, says this is a loss or expense now pressing upon us, and it must be at once provided for. I pay my one fourth, and I require that my partners should at once pay the remaining portions. That is not the present case. The present is the case of a dissolution of the partnership, and the order of proceeding in that case is specifically provided for by article ten. Thus it is provided that upon the dissolution or termination of the co-partnership, the property, assets and effects shall be divided as follows: The

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debts of the said firm shall first be paid, then the capital contributed by each partner, with interest thereon, shall be paid in full; then the remainder shall be divided as follows: One-half thereof equally between the partners; *i. e.*, one-fourth to each; the remaining one-half according to the several amounts of capital furnished, as specifically set forth. There can be no doubt of the meaning of this article, to wit, that from and out of the assets and means in gross, the debts shall first be paid. From and out of the remainder the capital shall be returned. What still remains shall be divided into two equal half parts. Of these, one shall be distributed among the partners equally. The other shall be divided according to the capital furnished, as therein set forth. This section controls the disposition now to be made, and the referee did right in following it.

I do not intend to say that in any case the defendants' construction of the seventh article is a sound one. Its operation in a case like the present, where there are four partners, and where two contribute much the larger portion of the capital, would be unequal and unjust. By a charge of one fourth of the debts, and a credit of one sixth of the profits, a partner might soon be ruined, while the firm should prosper and grow rich. If a partner intelligently entered into such a bargain, he might be held to it. But where there is another article which might reasonably be held to give a different character to it, it should be decided in accordance with the latter provision. The question before us falls within the very words of the tenth article, being the case of a dissolution or termination of the partnership, and the decision has been in accordance with its provisions.

The defendants are jointly liable, for the reason that they took the assets of the firm, not as partners therein, but jointly as members of a new firm. McNulty and Merritt, the new concern, took all the property of the old firm, and assumed to distribute the property to those entitled to it.

The judgment should be affirmed with costs.

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WM. H. LEONARD, *Comr.*—The defendants claim that the losses mentioned in the seventh article of the co-partnership agreement refer to the bad and uncollectable debts and assets of the business, and that a division of these “equally, share and share alike,” as there agreed on, requires that an equal amount of them should be charged to each partner individually.

Such a construction is clearly repugnant to the subsequent provision of the tenth article. The provisions of that article relate to a division of the assets upon a dissolution or termination of the co-partnership. It directs that the capital contributed by each partner shall, after the payment of liabilities, be paid in full with interest, if there be sufficient, and if insufficient, rateably, share and share alike; and then provides for the division of the balance of assets remaining, or net profits. The result of the whole business was a small net gain upon the capital invested. According to the tenth article, the capital of each partner should be re-paid with interest, and the gains or profits should also be divided, giving each member a certain fixed proportion.

But by considering the word “losses” in the seventh article as referring to the bad debts, &c., the defendants, who, by the dissolution, were entrusted with the settlement of the business and the possession of the assets, divide the amount equally, and charge that proportion to each partner individually, thereby swelling the indebtedness of each to the business. The result of this construction is to absorb the whole capital of Eastwood as well as his share of the net profits. That is the provisions of the tenth article as to the assets remaining after the payment of all liabilities, is wholly inoperative as to Eastwood.

The word “losses,” in the connection in which it occurs in the seventh article, is ambiguous. It does not necessarily refer to bad debts or depreciation of stock. The usual signification of “losses,” when applied to the business of a partnership refers to the diminution or depreciation of

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capital. The losses by bad debts and depreciation of stock is chargeable to the whole business, usually in the "profit and loss account," for the purpose of determining whether there has been a gain or loss in the business. By the tenth article, if the assets proved to be insufficient to return the capital upon dissolution, the amount remaining after the payment of liabilities was to be divided rateably. It is clear and unambiguous that each partner was to be paid his capital if the assets were sufficient; and if insufficient, that the amount remaining was to be shared rateably upon a dissolution.

This examination shows conclusively that the construction of the defendants could not have been the understanding or the intention of the parties. A reference to the phraseology makes it further evident, or probable, that the losses by bad debts, &c., should be borne by the business in the usual manner, charging them to profit and loss. The words, "share and share alike," are used in the tenth article inappropriately.

In case the assets are insufficient to pay the capital in full they are to be applied "rateably, share and share alike." This is a contradiction in terms. It seems quite probable that the words "equally, share and share alike," in the seventh article, are there used inconsiderately and inartificially, without expressing the real meaning or intention of the parties.

Whether we refer our construction of the intention of the parties to the repugnancy of the two articles or the ambiguity of the phraseology, we are warranted in holding, with the referee and the general term of the supreme court, that the bad debts and care chargeable to the business, and that the surplus, after the payment of liabilities, is to be divided according to the provisions of the tenth article. The seventh article is ambiguous in its terms. The tenth is definite and certain; and if we refer the losses spoken of in the prior article to a depreciation of the capital, there is, then, no repugnancy. The judgment should be affirmed with costs.

All concur; judgment affirmed.

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N. Y. SUPERIOR COURT.

FREDERICK S. WINSTON agt. STEPHEN ENGLISH.

The object of allowing an examination to be had before issue joined, of an adverse party, under §391 of the Code is not to enable the plaintiff to ascertain whether he has a cause of action, but to enable him to obtain testimony in support of a cause of action, which he has good reason to believe he has, and especially of those facts of which he has reasonable grounds for believing the defendant has a peculiar knowledge, which he keeps concealed within his own breast.

Nor is it to enable a defendant to ascertain whether he has a defense, but to enable him to obtain testimony in support of a defense which he has good reason to believe he has.

This case is an action for a libel, and the application for plaintiff's examination is made upon defendant's affidavit, which shows the service of a complaint upon him, but does not describe the nature of the libel. No copy complaint is attached, nor has any been submitted to the court.

The affidavit states that the defendant is advised that the examination of the plaintiff is necessary and material for the purpose of enabling him, the defendant, to frame his answer to the complaint, and to plead and prove the facts and circumstances sought to be discovered in justification or mitigation of damages. It also states what he expects to prove by such examination, and concludes by enumerating a great variety of matters.

But the defendant does not show by whom he has been advised, as stated—does not say that he has no knowledge or information sufficient to form a belief as to the matters charged against him, and yet does not disclose what knowledge or information he does possess. No facts are stated from which the materiality or necessity of such examination can be gathered.

As the case stands, the defendant has not only neglected to bring himself within the rules and practice of the court relative to the examination of a party under §391 of the Code before issue joined, but has failed to satisfy the court of the good faith of his application.

The examination of adverse parties and bills of discovery considered under the common law, the Revised Statutes, court of chancery, and the Code.

At Special Term, February, 1873.

JOHN K. PORTER and ROBERT SEWELL, *for plaintiff and motion.*

THOMAS DARLINGTON and T. C. T. BUCKLEY, *for defendant opposed.*

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FREEDMAN, *J.*—This is a motion to vacate an order heretofore made, and a summons thereupon issued for the examination of the plaintiff, on behalf of the defendant, under §391 of the Code. The motion is made upon said order and summons, and the affidavit, upon which they were granted and issued respectively, and the grounds of the motion are :

1. That the affidavit aforesaid does not bring the case within the rules and practice of the court concerning the examination of parties before issue joined.

2. That the case is one in which such examination cannot be had ; and

3. That said order and summons were improvidently issued.

The proper determination of the questions involved in the points raised, requires a somewhat extensive examination of the course of legislation and the practice of the courts concerning applications for discovery and the examination of adverse parties.

In former times when the jurisdiction of the court of chancery and the courts of law was kept strictly separate, it often happened that a party had a full and perfect cause of action or defense to which the courts of law could apply an adequate and appropriate remedy, but that such remedy, by reason of the absence of legal proof to maintain the facts on which it was founded, but for the interference of a court of equity would entirely fail. The party against whom that remedy was sought, could, at law, in most cases, protect himself by his silence against a disclosure of those facts, and thus defeat both the legal and conscientious rights of his adversary.

But here, says Mr. Graham, in his valuable work on jurisdiction, the power of the court of chancery stepped in to prevent this injustice ; and acting as it did in all cases upon the conscience of the party, by compelling a discovery on oath, it placed in the possession of the court of law the means unattainable by the latter's form of proceeding—of

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enforcing those rights, which would have otherwise remained entirely unprotected. The bill usually distinguished by the title of a bill of discovery, was a bill for the discovery of facts resting in the knowledge of the defendant named therein, or of deeds or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery, though it usually prayed an injunction against the proceedings at law until the discovery was made. And although the more usual application was for a discovery in aid of an action really pending, yet the existence of the action was not considered indispensably necessary so that in case of *prima facie* ground for an action, the court considered itself at liberty to compel a discovery in aid of the action to be brought.

The exercise of the jurisdiction was restricted, however, by salutary rules intended to prevent its abuse. One of these was, that the complainant, in the bill, had to show the clear necessity of a discovery, and where the bill was, by a defendant at law, that the facts sought were material to his defense. For where the facts depended on the testimony of witnesses, and the court at law could compel their attendance, or where the court at law had the means of ascertaining the facts by examination of the same party, or by reference to records or otherwise, or where the assistance of a court of equity did not appear material or necessary to the support or defense of an action, chancery refused to interfere; so it would not sustain a bill of discovery merely to get admissions to be used in mitigation of damages in an action of trespass at law (*Gelston agt. Hoyt*, 1 Johns. Ch., 543).

Another rule was, that the discovery sought, if made, should not subject the defendant in the bill to pains, penalties, or forfeitures, it being a fundamental doctrine of the court that equity does not assist the recovery of a penalty or forfeiture whether it flow from the act of the party himself or from the statute. The exceptions to this rule grew out of express statutory provisions, which, in certain cases,

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specially limited the effect of the discovery to the object of the civil proceeding in aid of which it was sought.

Still another rule was, that the discovery should be for the attainment of an object which the court could approve. Hence, where such assistance was sought in support of an action brought to recover the amount of the plaintiff's expenditure in sumptuous entertainments to ladies of fortune, which the defendant had undertaken to pay, the objects of such entertainments having been the introduction of the latter with a view to an advantageous marriage. The court of Chancery in England refused to interfere (*King agt. Burr*, 3 *Meriv.*, 639).

So where such aid was sought for the purpose of defending an action upon a contract, which, though perhaps not strictly illegal as between the parties was injurious to the public, a discovery was refused (*Cousins agt. Smith*, 13 *Ves.*, 542).

In the course of time a practice grew up at common law that where a plaintiff declared upon a written instrument the defendant might have a copy of it by taking out a summons before a judge at chambers, who, thereupon, made an order that a copy of the instrument be forthwith delivered to the defendant or his attorney, and that all proceedings in the action be stayed in the meantime. Lord MANSFIELD laid it down as a rule that if the papers, of which the inspection and leave to copy them is prayed, are such as the party could get at, or a bill in equity for a discovery, the application ought to be complied with at law to avoid the delay and expense of the remedy by bill. In the state of New York, however, the courts very much confined this principle, and until the Revised Statutes, chancery was, almost in all cases, resorted to when a discovery was required.

But under the Revised Statutes (2 *R. S.*, 199), power was conferred upon the supreme court by general rules to establish, modify, alter, and amend the practice in the said court in the cases not provided for by any statute (*Sec. 19*). The

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21st Section empowered the court in all proper cases to compel any party, to a suit pending therein, to produce and discover books, papers, and documents in his possession or power, relative to the merits of any such suit, or of any defense therein.

The 22d section directed the court, by general rules, to prescribe the cases in which such discovery might be compelled, and the proceedings for that purpose not given by the statute. It also provided that therein the court should be governed by the principles and practice of the court of chancery in compelling discovery.

The 24th section provides that every such order for discovery may be vacated by the officer granting the same or by the court.

1. Upon satisfactory evidence that it ought not to have been granted.

2. Upon the discovery sought being made, and

3. Upon the party required to make the discovery, denying, on oath, the possession or control of the books, papers, or documents, ordered to be produced.

In pursuance of these statutory provisions the supreme court, by rules, determined the cases in which applications for discovery might be made in the manner pointed out by the Revised Statutes (*Rule 28*) and prescribed the nature of the proof to be furnished as to the necessity and materiality of the relief sought (*Rule 29*).

The original act being confined to the supreme court, it was afterwards extended to the superior court and the New York common pleas, both of which adopted, word for word, the rules of the supreme court in relation to the practice under it (*Laws of 1830, 18, § 3; Laws of 1841, 22; Superior Court Rules, 72-75; Common Pleas' Rules, 32-35*).

These statutory provisions and rules related exclusively to actions at law. But after the abolition of the court of chancery by the Constitution of 1846, and of the distinction between suits at law and in equity by the Code, they became

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applicable to all cases, subject, however, to the power of the courts to alter, amend, and modify the same.

The remedy for obtaining discovery was still further enlarged by another provision of the Code, which empowers the court, before which an action is pending, or a judge thereof, in their discretion, to order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any books, papers, or documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein (*Sec. 388*).

The distinction between the common law remedy of discovery, the remedy provided for by the Revised Statutes, and that of the Code, may, therefore, be briefly stated to be as follows :

1. At common law the power of the court to compel the production of writings in actions pending, was confined to those which were the foundation of the action. Being evidentiary only, was not enough.

2. The Revised Statutes and the rules of court, made in pursuance thereof, embrace all writings, which, in any way, relate to the merits, provided their production could formerly have been enforced by bill in chancery.

3. Section 388 of the Code, on the other hand, leaves pretty much everything but the nature of the writings to the discretion of the court. These must either be, or contain evidence, relating to the merits of the action or the defense therein.

The difference in the consequences of a refusal to comply with the order under these different remedies, does not require to be considered here.

Next in order, it is to be noticed, that the Code abolished the action to obtain discovery, under oath, in aid of the prosecution or defense of another action (*Sec. 389*), and substituted therefor, as an additional and cumulative remedy to those already noticed, the examination of a party as a wit-

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ness on behalf of the adverse party, so that now a party may examine his adversary as a witness in the same manner as any other witness, either at the trial conditionally or upon commission (*Sec. 390*), and the examination, instead of being had at the trial may even be had at any time before trial, at the option of the party claiming it (*Sec. 391*). The examination, when thus taken before trial, is to be filed in the same manner as the examination of a witness taken *de bene esse* is required to be filed, and may, thereupon, be read by either party on the trial (*Sec. 392*).

These provisions altered only the mode of obtaining a discovery, and they abolished only the form, but not the nature of the relief formerly obtained by bill. The rules and practice of the courts which were not inconsistent with the changes introduced by the Code, were expressly continued in force (*sec. 389 of 1848*), and that section was subsequently amended so as to continue the power of the courts to relax, modify, or alter the same (*sec. 469, as amended in 1849*). Provision was also made for a convention of judges to make general rules to carry into effect the provisions of the Code, and such other rules, not inconsistent with the Code, as might be deemed proper (*sec. 470 as added in 1849*). By an amendment of this section in 1851, another convention of judges was directed to be held to revise the said rules, and by a second amendment, made in 1852, it was further provided, that the convention should consist of the judges of the supreme court, of the superior court of the city of New York, and of the court of common pleas for the city and county of New York; that the same should meet every two years, and at every such meeting should revise the general rules and make such amendments thereto, and such further rules, not inconsistent with the Code, as may be deemed necessary to carry it into full effect.

The courts, therefore, continued to regulate by rule the cases, and the manner, in which a discovery could be had, and the nature and extent of the proof to be submitted on the

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making of the application. But no rule concerning the application for the examination of a party before trial, under section 391, was enacted until 1870. In the absence of such a rule the practice of several of the courts soon commenced to differ.

While the supreme court held that under that section a party cannot be examined before issue joined (*Bell* agt. *Richmond*, 50 *Barb.*, 571), this court maintained that in case of clear necessity, the examination may be had immediately after the service of the summons (*McVickar* agt. *Greenleaf*, 4 *Robts.*, 657, *S. C.*, *sub nom.*; *McVickar* agt. *Ketchum*, 1 *Abb.*, *N. S.*, 452).

In the last named case the necessity existing for an immediate examination was conceded, provided the right to the examination existed, which was denied. The necessity arose from the circumstance that the defendant, Edward B. Ketchum, was about to plead guilty to an indictment, and that the entry of such plea had been postponed, with the sanction of the court in which the indictment was pending, for the purpose of allowing his testimony to be taken in civil suits.

But, although the decision was in favor of the immediate right of examination, the court, nevertheless, directed that the examination should proceed after service of a copy of a verified complaint. *Fullerton* agt. *Gaylord* (7 *Robts.*, 551), was decided upon the authority of *McVickar* agt. *Ketchum*. In *Duffy* agt. *Lynch* (36 *How.*, 509), however, it was further held in this court, that to prevent abuse, a party applying for the examination of his adversary before issue joined must show by affidavit, with as much particularity and certainty as his own knowledge, or information from others will permit, the facts which will enable the court to restrict the examination within reasonable limits, and to rule intelligently upon objections taken to questions propounded.

This conflict of judicial opinion continued to exist until the passage of the 21st rule adopted by the convention of

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judges, which met pursuant to the requirements of chapter 408 of the laws of 1870.

The rule is as follows; "The application for an examination, under section 391 of the Code, shall be upon an affidavit disclosing the nature of the discovery sought, to enable the party to frame his complaint or answer, or to prove his case or defense upon the trial, and how the same is material in aid of the prosecution or defense."

In connection with this rule the said convention re-enacted the 14th, 15th, 16th and 17th rules of 1858 as rules 18, 19, 20 and 22 of the new revision, but with an amendment to the 15th as an additional safeguard against abuse. Prior to 1858 the said rule had read as follows:

"The moving papers on the application for such discovery shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers and documents whereof discovery is sought, are not in the possession nor under the control of the party applying therefor."

To that the following addition was made in 1858:

"The party applying shall show to the satisfaction of the court, or judge, the materiality and necessity of the discovery sought, and the particular information which he requires."

And to this the convention of 1870 made the further addition:

"And that there are entries in the book or paper referred to of the matter he seeks a discovery of."

Thus it will be seen that while the legislature, representing the progressive power of the state, from time to time extended the right of discovery to new classes of cases, and provided new and additional remedies for securing it; it constantly looked to the courts as the representative power of the conservative element, for the prevention of the abuse of the letter of the law in individual cases. In the discharge of this duty the courts always were and still are governed,

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in case of doubt, by the principles and practice which prevailed in the court of chancery.

Whenever, therefore, a party applies, under sec. 391, after issue joined, for the examination of the adverse party as to matters within the issues, the application is usually granted as a matter of course and of absolute right. In such case slight evidence is sufficient to satisfy the court as to the materiality of the discovery sought.

But when the examination is sought at an earlier stage, where the danger of abuse is imminent, and the difficulty of restricting the examination within reasonable limits great, the court is bound to ascertain by evidence, not only that the examination is material, and how it is material, but also that it is made in good faith, and for a necessary and proper purpose.

If all this is shown affirmatively, the examination is a matter of right, but otherwise not.

For the object of allowing the examination to be had before issue joined, is not to enable a plaintiff to ascertain whether he has a cause of action, but to enable him to obtain testimony in support of a cause of action, which he has good reason to believe he has, and especially of those facts of which he has reasonable grounds for believing the defendant has a peculiar knowledge, which he keeps concealed within his own breast (36 *How.*, 509).

Upon the same principle the examination cannot be had to enable a defendant to ascertain whether he has a defense, but to enable him to obtain testimony in support of a defense, which he has good reason to believe he has.

One of the great benefits to be expected from the examination of the parties, say the learned codifiers, is the relief it will afford to the rest of the community, in exempting them, to a considerable degree, from attendance as witnesses to prove facts which the parties respectively know, *and ought never to dispute, and would not dispute, if they were put on their oaths* (*Rep. of Com. on Pr. and Pl.*, 244)

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Now the case under consideration is an action for libel, and the application for plaintiff's examination is made upon defendant's affidavit, which shows the service of a complaint upon him, but does not describe the nature of the libel. No copy of the complaint is attached, nor has any been submitted on this motion. In fact, both parties have seen fit to withhold from me the facts constituting the libel. The affidavit states that the defendant is advised that the examination of the plaintiff is necessary and material for the purpose of enabling the defendant to frame his answer to the complaint, and to plead and prove the facts and circumstances sought to be discovered in justification or in mitigation of damages. The defendant also swears that he expects to prove by the examination of the plaintiff the substantial truth of all the allegations averred to have been made or published by the defendant concerning the plaintiff. And thereupon the affidavit concludes with the enumeration of a great variety of matters respecting which discovery is sought.

But the defendant does not show by whom he has been advised as stated. He does not say that he has no knowledge or information sufficient to form a belief as to the matters charged against him, and yet he does not disclose what knowledge or information he does possess. He is silent even as to his belief in the premises. No facts are stated from which the materiality or necessity of the proposed examination can be gathered, nor is it alleged or shown that the plaintiff has a peculiar knowledge of the facts and circumstances sought to be discovered. On the contrary, most of them, if true and relevant, appear to be susceptible of easy proof by quite a number of other witnesses. And beyond all that it can be plainly seen that the defendant, if really desirous of relying on the truth of the libellous matter published as a defense already possesses all the knowledge or information which he requires for putting in a plea of justification or of mitigating circumstances, especially as

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the Code permits him to do it on mere information and belief.

Courts protect character, and, therefore, they will not assist in giving increased publicity to scandalous matter except when absolutely necessary for the promotion of justice. A man who publishes a libel should be in a condition to prove it. Consequently, if the doctrine exists at all, that a party may first publish a libel and then examine the person injured for the purpose of proving out of the latter's mouth the truth of the charge, which, however, has been denied in several instances, it certainly should not be extended except in case of clear and absolute necessity beyond the rule laid down in *Marsh agt. Davison*, (9 Paige, 580), where it was said, that in order that a defendant in a libel suit may have a discovery to aid his defense he must state a good defense, and then show the materiality of the discovery.

It is claimed, however, that whatever the rule may be it should be relaxed whenever it is made to appear that the defendant published the libel in the course of the publications of a newspaper, and the suggestion was made, that such is the fact, in the case before me. Although there is no evidence to this effect, I have, nevertheless, considered the point. In this connection I will state that I am not one of those who believe that unlimited liberty of speech, or of the press, is improper because productive in certain states of society of disastrous results. It is to the abnormal condition of the body politic that all evils arising from an unrestrained expression of opinion must be attributed and not to the unrestrained expression itself. Under a sound social regime and its accompanying contentment nothing is to be feared from the most uncontrolled utterance of thought and feeling. That which is really contemptible ought, therefore, to be exposed to contempt, and, consequently, derogatory charges of public importance ought to have full publicity. To argue otherwise is to take up the Machiavellian position, that it is right for the legislature to be an imposture, an organized hypocrisy;

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that it is necessary for a nation to be cheated by the semblance of virtue when there is no reality ; that public opinion ought to be in error rather than in truth, or that it is well for the people to believe a lie. For these reasons it is my profound conviction that the freedom of the press, the right of journalists to discuss matters of public concern, can hardly be too zealously guarded, and that in this country, more than in any other, the public press has a great mission to fulfill ; but in order to accomplish such mission the press must not only remain fearless and independent, but on the side of truth and justice.

A publication on a subject, which, though public, affects the character and good name of a citizen, must be fair criticism. If it is such the publication will be held to belong to the class of conditionally privileged communications. By this I mean to say, that the *prima facie* presumption of malice which would exist, from the language used, but for the occasion of such use is rebutted. But this privilege is qualified and conditional. It cannot be used for purposes of revenge nor to gratify personal spite. It is not a privilege to make a statement which the publisher does not believe to be true, and if he volunteers to defame another in a matter in relation to which he has no duty nor interest as a legitimate part of his business to furnish the news of current events, such officious defamation ought to be presumed false and malicious till he proves its truth, and such is the law. No benefit can accrue to defendant's present position from any of these considerations.

As the case stands at present the defendant has not only neglected to bring himself within the rules and practice of this court relative to the examination of a party under sec. 391 of the Code before issue joined, but has failed to satisfy me of the good faith of his application.

For these reasons the order and summons heretofore made and issued must be vacated with \$10 costs to plaintiff.

Board of Supervisors agt. Brodhead.

SUPREME COURT.

THE BOARD OF SUPERVISORS OF ULSTER COUNTY agt. JOHN C. BRODHEAD, and others.

A party has no right, without showing any cause except his *own will*, to substitute one *attorney* for another, without the payment of the *costs* earned. And this rule applies to a *board of supervisors*.

Where a board of supervisors, by their vote, discharge a firm of attorneys who have been acting in their employ (so far as their vote can discharge them) merely because the supervisors choose so to do, with a view to substitute another attorney for the board, they must pay the firm of attorneys their reasonable claims, which may be ascertained by a reference. And the attorneys are not bound to consent to a substitution or to deliver the papers upon which they have a lien, until the amount of their just demands is ascertained by the court or a referee, and paid them.

Albany, Special Term, February 25, 1873.

THIS is a motion in the above action and six other actions and proceedings in which the supervisors are either plaintiffs or defendants, to compel a substitution of Mr. Peter Cantine, as attorney for the supervisors, in the place of James M. Cooper & Marius Schoonmaker.

The motion is based on an affidavit of Mr. Cantine showing resolutions passed by the board at a meeting held on the 12th of February, inst. discharging said Cooper & Schoonmaker, and appointing Cantine in their stead, as attorney for the board.

Opposing affidavits are presented by Messrs. Cooper & Schoonmaker.

The facts set forth in the affidavits are sufficiently stated in the opinion.

P. CANTINE *in person* and N. C. MOAK, *for motion*.

MARIUS SCHOONMAKER *in person*, and I. PARKER *opposed*.

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LEARNED, *J.*—This is a motion, made by the board of supervisors, who are parties, either plaintiff or defendant, in all these seven suits and proceedings, that P. Cantine, Esq., be substituted as their attorney. In one of the suits, Mr. James M. Cooper and Mr. M. Schoonmaker are the present attorneys for the board. In the others, Mr. James M. Cooper is their sole attorney, and Mr. Schoonmaker is counsel in all. The notice of motion further asks that Messrs. Schoonmaker and Cooper be required to deliver to Mr. Cantine all papers in said suits and proceedings, and all writings, papers and securities in their possession belonging to the county of Ulster.

There are, then, two distinct applications: 1st. That Mr. Cantine be substituted as attorney; 2d. That the present attorney and counsel deliver to him not only the papers in suits and proceedings, but also all securities in their possession belonging to Ulster county.

It should be said in the outset, that there is no charge made in the papers of any improper conduct, or of any negligence on the part of the present attorneys and counsel. Nor are they charged with any want of professional ability to take proper care of the interests of their clients. The motion is put solely on the ground that the supervisors, without assigning any reason, desire the change. The case is, therefore, free from any questions which might arise, if charges of any kind had been made or suggested against the present attorney and counsel. It comes simply to the point: What are the rights of a party who, without showing any cause except his own will, desires to substitute one attorney for another?

It was objected by the opposing counsel that the rule 15 requires that the change of attorney should be made by the order of a justice of the court and not otherwise; and that this should prevent the hearing of this motion at special term. I do not think, however, that rule was intended to deprive the court of its inherent control over this matter.

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Its meaning must be, change cannot be made without an order either of the court or of a justice out of court. Still, it is important to observe that this rule provides that an attorney may be changed by consent, "*or upon cause shown, and upon such terms as may be just*;" thus indicating that the change of attorney, unless by consent, is to be made only for cause, and upon terms. This rule took effect in October, 1858, having been adopted a few months before; and it certainly must be regarded as an authoritative declaration of the court upon this point from that time.

As this motion was very earnestly argued on each side, I have examined all the cases cited by both counsel on this point, and shall state them briefly.

Brassington agt. *Brassington* (1 *Simons & Stuart*, 456) did not involve the question of substitution or of the lien of an attorney on the papers in a cause. It held, only, that a solicitor who had a lien on a deed in his possession could not, as a witness, refuse to produce the deed.

A question more closely analogous to the present was, however, presented in *Bolton* agt. *Tate* (1 *Swanston*, 84). There the plaintiff's solicitor had died. His widow and administratrix refused to deliver the papers to the new solicitor till payment of costs. A motion was made to compel the delivery. The court said, "If a party chooses that his solicitor shall not proceed, it would be in vain for him to insist on taking papers out of the solicitor's hands till what is due to him was paid." And even in that case, where death had made a new appointment necessary, the motion to compel the delivery of papers without payment of costs was denied.

In *Cromwell* agt. *Poynton* (1 *Swanston*, 1), the solicitor had refused to act any longer for the defendant, the court ordered that the defendant might inspect and take copies of the deeds, &c., in the solicitor's possession. Thus, in that case, it was the solicitor who refused to act, not the client who discharged him.

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In our own state the case of *Mumford* agt. *Murray* (1 *Hopkins*, 369), holds that a solicitor cannot be displaced without an order of the court; and Chancellor SANDFORD says, "Without this restriction a solicitor might be deprived of his lien for costs," thus indicating that the payment of costs would be made a condition by the court.

In *Stevenson* agt. *Stevenson* (3 *Edws. Ch.*, 340), Vice-Chancellor McCOUN held that the court would not deprive a solicitor of his lien on papers, nor, on the other hand, make it a condition of the change that the costs be paid.

Haight agt. *Halcomb* (16 *How.*, 173), and *Fox* agt. *Fox* (24 *How.*, 409), were cases in reference to an attorney's lien on a judgment, and did not touch the present question.

In *Trust* agt. *Repoor* (15 *How.*, 570), the substance of the opinion in the supreme court purports to be given. The attorney was charged with collusion with the opposite party, and the court is reported to have said that a client has a right to change his attorney at his own volition, whatever be his motives, whether a mere caprice or a substantial reason. The court ordered a substitution, and also ordered the delivery of the papers on payment of costs. This decision was made before the adoption of the rule above mentioned, that attorneys may be changed by consent, or upon cause shown.

There are two cases where no opinion is written, both purporting to be made by the same judge and both reported on the same page (5 *Robts.*, 611; *Halcott* agt. *Gill*, and *Wolf* agt. *Trochelman*). One states the right to change an attorney is an absolute right, except that the lien on papers will be retained. The other says that the change can only be made on such terms as may be just, which, in special cases, may involve the payment of the attorney's costs. It is seldom one can find on the same page so happy an illustration of the uncertainty of law. These cases may be said to neutralize each other.

In *Gardiner* agt. *Tyler* (36 *How.*, 63), a motion was made

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to substitute an attorney for the plaintiff. A reference was ordered to report the amount due for costs, disbursements, and counsel, and that, on the coming in of the report and payment of the amount, the attorney be substituted. The reference took place and the report was made.

The plaintiff declined to pay, and abandoned his application for substitution. Subsequently a motion was made to compel the plaintiff to pay these costs, which was denied, the court holding, that, as the plaintiff had abandoned his application to change his attorney, no order could be made to compel him to pay. It seems, however, to have been admitted that he could not change his attorney without paying the costs, disbursements, and counsel of the former attorney.

In *Creighton* agt. *Ingersoll*, (20 *Barb.*, 541), a partition suit, the general term refused to allow the substitution of an attorney for the plaintiff until all the disbursements were paid; and subsequently, after the sale of the property, they required the costs of the former attorney to be paid out of the fund in court.

The case of *Hoffman* agt. *Van Nostrand*, (14 *Abb.*, 331), is important. A report had been made in favor of the defendants. The plaintiff appealed. The costs of the plaintiff's attorney not having been paid he suffered judgment to be affirmed by default. The plaintiff now applied for the substitution of a new attorney. The attorney opposed on the ground that his claim for services had not been paid. The courts say that a party has no right to change his attorney without leave of the court, and that the court will not allow the change until all the just claims of the attorney are discharged or secured. The motion was granted on the payment of the costs earned by the attorney.

That the same rule applies to corporations as to individuals, in this respect, is decided in *Parker* agt. *Williamsburg*, (13 *How.*, 250).

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There remains another case cited by both parties and of high authority; *In re Paschal* (10 Wall., 483). In this there was a motion in each of two cases; one to compel Paschal an attorney and counsellor to pay over certain moneys collected by him, and the other to strike his name from the docket as counsel of the state of Texas.

The first was opposed, on the ground that he was entitled to retain the money, or part of it, in payment for his professional services; and was denied.

The second was opposed on the ground that he had a contract as to that case, by which his payment was contingent on his recovery in the action, and that therefore he could not with justice be removed as counsel. And this motion was granted.

This second motion, therefore, which is analagous to a motion to substitute, was not opposed on the ground that there could be no substitution until the costs, which had been earned, were paid; for, by the terms of the contract nothing had been earned; but, as was said by the counsel for Paschal, it was opposed on the fact that the fee was to be contingent on recovery, and then by his removal he could not earn his fee, and the court in its decision says, that Paschal will, under the decision of the first motion, be able to retain the money in his hands and any papers and documents, until his claims are adjusted. That money, over and about his disbursements and his charges in the first suit was about \$14,000 in gold.

There is a remark in the last case which is applicable to the present motion. "When," the court say, "there exists a technical barrier to prevent the respondent from instituting an action against his client, it would seem to be against all equity to compel him to pay over the fund in his hands." In the present case it seems to be settled that no action against the board of supervisors will lie. So they claim on this motion. There is, therefore, the more

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reason that the court should not aid them in refusing to pay what they owe.

On this review of the case, it seems to me that with the exception of *Stimson* agt. *Stimson*, and, perhaps, of *Trust* agt. *Repoor*, the current of authority is uniform—that a party cannot insist, as a matter of right, upon a substitution of one attorney for another without the payment of the costs earned.

It is said that a man has a right to change his agent as he pleases. But the attorney is more than an agent. He is an officer of the court, subject to its summary control, and entitled to its protection. When he has faithfully conducted his client's suit, and no cause of complaint is shown, it is not unjust that the client, who wishes to dispense with his further services, should first pay for those already performed. To take a homely illustration: A man may select and may change his tailor; but if he sends a coat to be mended he cannot take it away when the job is half finished and send it to another workman without first paying for the work already done.

On the other hand, when a client desires a change of attorney, and is ready to pay for past services, if the attorney were to refuse to fix the amount of his bill, or were to state some exorbitant amount, there would be, in such acts, evidence of a desire to wrong the client, which a court should not permit. Now, in the present case, the moving papers allege a demand for substitution and for all papers and documents, and a refusal to comply until the attorneys should be paid in full for their services. They also allege an inquiry as to how much the attorneys claimed, and a reply that they were unable to state. They do not aver any offer to pay what was justly due or any present readiness so to do. Indeed the whole argument for the moving parties proceeded on the theory that they ought not to be required to pay the costs as a preliminary to substitution, or to getting possession

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of the papers. On the contrary, both of the opposing affidavits of Mr. Cooper and Mr. Schoonmaker say that they were not asked for the amount of their bills; that, previously to the interview, they had settled upon the gross amount of the charges, and were prepared to state the amount, if it had been asked. It is impossible, on these affidavits, to see that the present attorneys were throwing any unreasonable obstacles in the way of a substitution. They said they would not deliver any papers till they were paid. It is stated in the affidavits that Mr. Cantine said, "If we should differ as to the amount of your charges, I do not know that there is any way to fix it except to be audited by the board of supervisors," to which mode of adjusting their claims Mr. Schoonmaker and Mr. Cooper returned a positive refusal. It appears, therefore, clearly, that the position of the moving parties was not that they were ready to pay the claims of the present attorneys, either as they might state them or as the court or a reference might have them adjusted. But their position, on the contrary, was, that by their own vote they could change their attorneys in this court, and could require the court to compel summary delivery by these attorneys of the papers in their hands, while for the services already performed these attorneys were to have no remedy but an application for the audit of their claims to the same board of supervisors which had discharged them. It is undoubtedly true, that no action for a county charge can be maintained against a county or a board of supervisors. But I am not aware that a man, who has in his possession property of the county on which he has a lien, is obliged to surrender the property and trust to an auditing of his debt. If, usually, attorneys have a lien on the books and papers in their hands, or if, by the settled practice of the court, they cannot be discharged by clients without payment of their costs, then they must have the same rights even when they are so unfortunate as to have clients whom they cannot sue for their compensation.

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The opposing attorneys further state their retainer by the board of supervisors, and briefly their services under this retainer. They aver that they have spent much time and labor, and that large amounts are due them therefor; that for such amounts they have a lien on the papers in their possession, and are not bound to consent to a substitution or to deliver the papers until these demands are satisfied, the amount to be ascertained by the court, or referee, as the court may direct. Although the protection thus afforded by the court to attorneys, is directly for their benefit, it is indirectly for the benefit of clients. It tends to ensure to attorneys, faithfully discharging their duty, the just compensation for their labor; and it thus makes them more earnest in their client's behalf. Certainly the court ought to see that its own officers, when charged with no misconduct, should be paid for their services, before that security is taken away which the control of a suit and the possession of papers gives to them. And it may be said in this connection, that in the present case not only do the affidavits make no charge of misconduct, but even the report of the committee of the board of supervisors does not suggest anything of that nature, or even any unwillingness on the part of the present attorneys to take any action required of them by the board.

They seem to have been discharged (so far as the vote of the supervisors can discharge them) merely because the supervisors chose so to do.

Assuming, then, that the mere will of these clients is sufficient cause for the change, it seems to me that the just terms indicated in the rule above mentioned and by authority must be the payment of the attorneys' reasonable claims. It must, therefore, be referred to some referee to take proof, and report the amount due Messrs. Cooper and Schoonmaker for costs, disbursements, and counsel, and on the coming in and confirmation of his report and payment to them of the amount found due, Mr. Cantine may be substituted, and the

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papers, &c., in the present attorneys' hands must be delivered to him. It is not necessary at this time to decide whether or not the lien of the attorneys, or the right to oppose substitution in general, or whether the claims as to such suit or proceeding must be confined to that suit. No distinction was made in the argument. The motion was general, and I cannot now separate their rights.

Ten dollars costs of opposing this motion must be allowed.

The Deposit Nat. Bank agt. Wickham.

SUPREME COURT.

THE DEPOSIT NATIONAL BANK, plaintiff, agt. DECKER C. WICKHAM and others, defendants.

A watch is property liable to execution.

A judgment debtor in proceedings supplementary to execution, while the order is in force, has no right to violate it by transferring his property to employ an attorney for him in such proceedings. The creditors lien is prior to the attorney's.

Second Judicial Department, General Term, February, 1873.

THE proceeding was for contempt by a judgment debtor, in violating the injunction usually embodied in an order for examination in supplementary proceedings.

On the day of the examination before a referee, the defendant, as he afterwards testified, "paid out his watch, for \$200, to D. D. McKoon & G. O. Hulse, his attorneys," and as it was claimed, he was required by them to do, before they would "do anything for him;" that is, having done some business for defendant without being sufficiently remunerated, they refused to appear for him in the supplementary proceedings, unless he gave them this watch on account, or as pay. In the proceedings to punish for contempt before the county judge, the defendant's attorneys claimed that defendant had a right thus to employ an attorney. The defendant was adjudged guilty of contempt, by Hon. S. W. FULLERTON, county judge of Orange county, and fined one hundred dollars, from which order defendant appealed to the general term of the supreme court, where the order was affirmed in the second department, in February last.

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The decision settles two points. 1st That a watch is liable to execution.

2d That a debtor while the order is in force, has no right to violate it by transferring his property to employ an attorney, a creditor's lien being prior to the attorney's.

W. J. GROO & HENRY W. WIGGINS, *for plaintiff.*

D. D. McKoon & G. O. HULSE, *for defendant.*

By the court, TAPPEN, J.—The defendant, a judgment debtor, owned a gold watch of considerable value, and while under supplementary proceedings, by the order commencing which, he was restrained from disposing of his property, he handed his watch to his attorney; for this he was adjudged guilty of contempt and directed to be imprisoned. It is not contended that the watch was exempt, as an article of property necessary to the defendant's use in his vocation. The commission of appeals held, in *Lynch agt. Johnson* (4 *Alb. L. J.* 243), that the service of the order for examination under secs. 292–294 of the Code, gives the judgment creditor a lien upon the property of the debtor. In this case, the creditor's lien is prior to that of the attorney, who took the watch, in pay for service to be rendered. The defendant's contempt was in this—he had property liable to execution, he voluntarily parted with it in defiance of the order of the court, and apparently for the express purpose of putting the property beyond the creditor's reach.

The Code has abolished creditor's bills so called, and substituted the remedy which the plaintiff resorted to. The authority of the court was then set in motion, and the defendant's voluntary disobedience makes him amenable in the only way by which such violation can be punished, and the process of the court enforced.

The order of the county court should be affirmed with \$10 costs.

J. F. BARNARD, J., concurring.

Howard agt. Dusenbury.

N. Y. SUPERIOR COURT.

WILLIAM HOWARD agt. CHARLES DUSENBURY.

Where a judgment is entered against a defendant, on contract, by default, and the defendant is afterwards several times examined in supplementary proceedings thereunder, without objection to the regularity of the judgment, he cannot on motion, made some twenty years afterwards, have the judgment set aside on the ground that he was an *infant* when the judgment was entered and that no *guardian ad litem* had been appointed for him in the action. His delay waived the irregularity in the entry of the judgment

Special Term March, 1873.

MOTION to set aside a judgment obtained by the defendant's failure to answer on the 2d day of June, 1853, on the ground that the defendant was an infant, under the age of twenty-one years at the time of the entry of the judgment, and that no guardian was appointed in the action, and as matter of favor.

IRA D. WARREN, *for defendant, for the motion.*FISHER A. BAKER, *for plaintiff, opposed.*

VAN VORST, *J.*—The material facts alleged in the affidavits in support of this motion on the merits, tending to show that defendant was not liable for the services, to recover for which, this action was brought, are distinctly denied in the affidavits read in opposition, and if relief be granted, it can only be on the ground that the defendant was an infant when the action was brought, and the judgment recovered, and that no guardian had been appointed.

It is not affirmatively alleged in the moving affidavit that a *guardian ad litem* had not been appointed for the defend-

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ant, yet in the notice of motion an omission in this regard is alleged as the ground of irregularity. The statement in the defendant's affidavit being that "this suit was commenced by the service of the summons on the 5th of May, 1853, and that defendant at that time, and until the 9th day of November, 1853 was a minor."

The presumption would be in favor of the regularity of the legal proceedings, and that every thing necessary to bring the defendant properly in court, was done.

But in the affidavit of the attorney who conducted the suit to judgment it is stated that he had never heard, and had no reason to suspect or believe that the defendant at the time the action was commenced was a minor, but on the other hand from the defendant's appearance and other evidence, he then believed and now believes the defendant was of full age, it is properly inferable therefore that no guardian had been appointed. It is not pretended or claimed that such steps had been taken, and this application must be decided on that ground. The judgment obtained against the defendant is not absolutely void on account of a failure to have a guardian *ad litem* appointed.

In *Kellogg* agt. *Klock*, (2 Code Rep. 28), GRIDLEY, J. says, "that the taking judgment against an infant by default without the appointment of a guardian *ad litem* was an irregularity," that there had been a want of adherence to the prescribed rule or mode of procedure. In *Fairweather* agt. *Satterley*, (7 Rob. 546), such omission is regarded as an irregularity.

In the light of an irregularity it is apparent that the delay of the defendant, on the facts, furnishes an answer to his application. It is true that no laches is imputable to an infant "*durante minoritate*" because he is not supposed to be conversant of his rights and not capable of enforcing them (*Ware* agt. *Bush*, 1 McLean R., 533). But in this case it appears that before the infant had arrived at full age, he was once examined in proceedings supplementary to execution

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upon the judgment and twice afterward, once in the year 1858, and again in August, 1872, and at no time, until this motion as noticed pretended or claimed that he was a minor when the judgment was recovered or that there was any irregularity in the proceedings.

. A judgment is in evidence of an indebtedness of a solemn form, in moving to set it aside for irregularity or otherwise the party affected should act with promptness: unreasonable delay in moving after knowledge of an irregularity, will be construed into a waiver, and will be deemed an acquiescence.

"No judgment in any court of record shall be set aside for irregularity on motion, unless such motion be made within one year after the time such judgment was rendered" (2 *R. S.*, 359 *Code* § 174).

This defendant had notice of this judgment at least as early as his first examination under proceeding supplementary to execution. He has acquiesced in it for nearly twenty years since he became of age.

In *Kemp* agt. *Cook*, (18 *Maryl.*, 130), it was held that when an infant waited six years after the entry of a judgment against him in an action in which he had appeared by attorney, his laches deprived him of the right to set the judgment aside for irregularity.

In *Graham* agt. *Pinckney*, (7 *Robt.*, 147), it has held that when a defendant has by his laches deprived himself of any legal right to set up the defense of infancy to avoid his contract, the court will not aid him by setting aside a judgment entered against him by default. In *Fairweather* agt. *Satterley* (*supra*), the applicant was still an infant when he moved for relief.

Under the circumstances of this case, considering the lapse of time since the defendant had first knowledge of this judgment, and the proceedings which have been had therein without objection, it would be improper at this late day to set it aside. The defendant must be deemed to have waived its regularity. Motion denied with costs.

Board of Supervisors agt. Brodhead.

SUPREME COURT.

THE BOARD OF SUPERVISORS OF ULSTER COUNTY agt. JOHN C. BRODHEAD, and others.

The proceedings in an action must be taken and conducted in the name of the *attorney of record*. Before another attorney can act or be heard in the cause he must be regularly substituted of record so as to show his authority.

A party has no right to interfere with the due and orderly conduct of a suit by his attorney.

Albany Special Term, February 25, 1873.

THIS is an action upon the official bond of the defendant Brodhead as treasurer of Ulster county, to recover an alleged deficiency of \$97,000, in the issue and sale of county bonds.

The cause was referred to D. A. Scott, Esq., of Newburgh, and having been tried before the referee he made and delivered his report, dated December 11, 1872, wherein he found and decided that no cause of action was established by the plaintiff, but that the county was indebted to Brodhead as late treasurer, in the sum of \$5,100, and ordered judgment in his favor for that amount and dismissed the complaint with costs, as to the other defendants, the sureties.

On the 12th of February, 1873, the board of supervisors convened, and by resolution discharged their attorneys and counsel, Messrs. James M. Cooper & Marius Schoonmaker, and appointed Peter Cantine attorney for the board in this and all other suits and proceedings.

Mr. Cooper and Mr. Schoonmaker refused to give Mr. Cantine a consent for substitution, or to part with the papers or securities in their hands until their fees and charges were

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paid, and the board not having made such payment, and without an order of substitution having been entered, now moved by Mr. Cantine, as attorney, for an order to stay the defendants from entering judgment or the referee's report upon taxing costs, until a substitution can be procured for Cantine, and thereafter until he can make a motion to set aside the referee's report, or to open the reference and give further testimony on the part of the plaintiff.

The motion is made on the referee's report, a copy of the testimony taken before him, and affidavits by Mr. Cantine and one Coykendall, Brodheads successor as treasurer, which allege in substance that in their opinion additional evidence can be produced which might make a more favorable case for the plaintiff.

At the opening of this hearing the defendant's counsel objected that Mr. Cantine could not make the motion; that the plaintiff had regular attorneys of record in the action, Messrs. Cooper & Schoonmaker; and that until Cantine was regularly substituted in their place he had no standing in court to move in his own name as attorney.

At the suggestion of the court, and by consent of defendant's counsel the affidavits and papers on the part of the plaintiff were read to see if there were any extraordinary circumstances in the case, such as misconduct by the attorneys, or refusal to take any proper action in the cause, to show a reason for the application by a different attorney.

No such circumstances being disclosed by the papers the court heard argument on the objection raised

P. CANTINE & N. C. MOAK, *for motion*

SAMUEL HAND, C. A. FOWLER, T. R. WESTBROOK, I. N.

FIERO and A. SCHOONMAKER, *for defendants.*

The defendant's counsel cited, *Parker agt. City of Williamsburgh*, (13 How., 250); *Webb agt. Dill*, (18 Abb., 264);

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Read agt. French, (28 N. Y., 285); Rules^o 13 and 15 Sup. court rules; Code, sec. 128.

LEARNED, *J. Held.*—That the proceedings in an action must be taken by and in the name of the attorney of record; that before another attorney can act or be heard in the cause, a regular substitution must be made so that the record shows his authority, that a party has no right to interfere with the due and orderly conduct of the suit by his attorney; and therefore ordered that Mr. Cantine had no standing in court as attorney for the plaintiff, and that this motion could not be entertained.

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N. Y. SUPERIOR COURT.

JOHN RILEY agt. JOHN BROWN.

Where on a motion by defendant to vacate a judgment against him and to discharge him from custody, it is referred to a referee to take proof to ascertain a single question of fact, to wit: whether the summons in the action was ever served on the defendant, and the referee reports, in favor of the defendant, he cannot move for a confirmation of the report until eight days notice of filing the report has been given to the plaintiff, that the latter may file his exceptions to the report, the motion will be denied as premature.

But on a final hearing at special term, after the filing of the report and exceptions taken thereto, the court may allow the plaintiff's motion to set aside the report upon his exceptions, and the defendant's application for confirmation of the report to come on to argument together.

The court has ample power under § 271 of the Code, to direct the determination of a material and controverted question of fact arising upon a motion to be ascertained by a referee.

At Special Term, June, 1872.

MOTION to vacate judgment and to discharge the defendant.

CHARLES S. SPENCER, *for the motion.*

SAMUEL H. RANDALL, *in opposition.*

FREEDMAN, J.—The motion, founded upon the order to show cause of June 7th, to vacate the judgment and execution and to discharge the defendant from custody, is premature.

The order of reference heretofore made by the court directed the referee not merely to take proof, but to determine the question referred to him, which question is one not arising upon the pleadings. Even upon the assumption, therefore, of the regularity of defendant's proceedings up to

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the time of the rendition of the referee's report, the said report before the making of this motion, should have been filed as required by rule 39 of the general rules and notice of such filing given. That not having been done, the motion must be dismissed, but without costs.

I will add, that whenever the report shall have been filed, the plaintiff will have eight days after the service of notice of such filing, within which to file exceptions. I can find no warrant in the law to abridge that time. But if exceptions are filed, plaintiff's motion to set aside the report upon such exceptions, and defendant's motion for a confirmation of the report and for final relief thereon may be heard together at special term, at the same time and place, and, upon a proper application may be required to be thus argued on short notice.

The report having been filed and the plaintiff having excepted, thereto a final hearing was subsequently had, and the court rendered the following decision :

FREEDMAN, *J.*—The order of reference made upon the argument of the motion, when originally brought on, directed the referee not merely to take proof and to report the same, with his opinion thereon, but to determine a disputed question of fact arising upon such motion, namely : whether or not there has been a service of the summons in this action upon the defendant John Brown. Although it is not the usual practice to order a reference in that form, yet the power of directing the determination of a material and controverted question of fact arising upon a motion in the manner herein pursued has, as I am informed, been exercised by the judges of this court on prior occasions, and has never before this time been seriously questioned. Indeed the power seems to have been conferred in express terms by the third sub-division of § 271 of the Code.

The testimony taken by the referee and submitted upon the present motion appears, on examination, to be amply sufficient to sustain his finding upon the question of fact re-

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ferred to him for his decision, and there being but a single question referred and no issues of law, the report is unobjectionable in point of form.

Plaintiffs' exceptions to the referee's report must be overruled and the report confirmed.

Upon the whole case, as brought on for final hearing, the defendant is entitled to have the judgment entered against him, and all proceedings founded thereon vacated and set aside, and to be discharged from imprisonment.

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SUPREME COURT.

JOHN FISHER *et al.*, respondents, agt. EDWARD ABEEL,
appellant.

In the absence of proof of a custom for agents to agree with the owner of a vessel upon the lay days to be allowed the freighter, such authority (not being shown by the contract of agency), cannot be *presumed*, but it must be expressly proved. Where no such authority is proved, the freighter is not liable on the express contract of the detention of the vessel.

Where there is no express agreement for demurrage, damages in the nature of demurrage may be recovered against the owner of the cargo when he improperly detains the vessel beyond a reasonable time for loading or unloading.

Detention of a vessel, while waiting her turn to load or unload, is not such a detention for which the owner of the cargo is liable.

Where an order for the sale and delivery of a quantity of coal was sealed up and delivered to the owner of a vessel to be taken to the coal company for the purchaser of the cargo without any specific knowledge of the owner of the vessel of what it contained, the conversation had at the time by the owner of the vessel with the agent for the coal company, as to the bargain respecting the coal, was properly received in evidence as the order introduced in evidence, and claimed to be the written contract, was not intended to embrace the whole contract, but was given in pursuance of part of it, and contained no more of it than was necessary to enable the coal company to know how much coal to deliver, and for whom, and the amount which it should advance.

General Term, Fourth Department, February, 1873.

APPEAL from judgment rendered for plaintiffs in Onondaga county court.

PRATT, MITCHELL & BROWN, *attorneys*, and
T. K. FULLER, *counsel for appellant, defendant.*

The plaintiff complained for a balance due on freight of a cargo of coal, and for delaying plaintiff's boat seven days, and demanded judgment for \$200.

The defendant denied the complaint, except as to the bal-

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ance of freight, which balance, together with the costs up to that date, were paid by defendant into court, amounting to \$33 90.

1869, March 12, judgment for plaintiffs, \$85 45.

1869, March 29, notice of appeal served.

1869, April 8, plaintiff's offer to reduce judgment to \$50, damages and costs.

1872, March 27, judgment for plaintiffs on re-trial in county court the second time, \$302 32, damages and costs.

It is from the above judgment, and from an order denying a new trial in the county court, that this appeal is taken.

The facts are briefly as follows :

The defendant was a coal-dealer at Syracuse, receiving his coal from Rondout, on the Hudson ; the plaintiffs were the owners of the canal boat, *Henry Wyker*, John Fisher master. One George Stillwell, Jr., a sort of broker in Broad street, New York, procured transportation for defendant in the usual way. His authority to act as agent for defendant is fully stated, and is the sole evidence on that subject in the case. Capt. Fisher went to Stillwell's office to procure a load for Syracuse, and obtained the order printed at fols. 112, 114. With this order he went to Rondout, and delivered it at the office of the "Delaware and Hudson Canal Company," on the 9th October, 1868. His boat was loaded in turn with stove-coal, the only size then due Abeel, and received his bill of lading, made out in pursuance of that order. This bill of lading was signed by Capt. Fisher in duplicate, one in the book of the company and the other taken by the captain.

The plaintiff claims to recover damages for delay in loading on a pretended verbal agreement between Fisher and Stillwell, which, if made, the undisputed proof shows that Stillwell had no authority to make. We shall submit whether the conversation detailed in the evidence amounted in law to a parol agreement to pay demurrage, claiming that it

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was but the expression of an opinion and cannot have the force of an agreement.

I. 1. "The best evidence ought always to be insisted upon and received." To admit parol evidence of a contract which had been put in writing under the circumstances detailed at pages 8, 9, and 10 of the case, is an infraction of the rules of evidence, which, it seems to me, will not be allowed by this court.

2. Attention is called to the statement of the court below in the ruling at fol. 46. The defendant, relying on that statement, introduced the written order and bill of lading in evidence, which contain the written contract of shipment, and then distinctly raised the question of the admissibility of parol evidence by a motion to strike out.

It is submitted that we were entitled to have this motion granted, inasmuch as it fully appeared that the contract of shipment was in writing, signed by the captain, according to the custom, in duplicate, each party retaining a copy and acting upon it. Under this head it may be appropriate to remark the rule :

(a) Demurrage proper can only be claimed where provision is made for it in the contract of shipment (*Morse agt. Pesant*, 2 *Keyes*, 16, 18, and cases there cited). Since the contract in this case is in writing, and so appears by the undisputed evidence in the case, it cannot be varied, contradicted, or we submit, extended by parol.

(b) The only exception to this rule, which we find in the books is this : Damages in the nature of demurrage may be recovered by the shipowner for unwarranted detention of the vessel through the fault of the consignee ; but this is not such a case. No claim is made for damages under the exception above stated. The claim is on the parol of Stillwell, outside the order and bill of lading, and claimed to have been uttered at the time the order was given.

3. In this connection we refer to the charge of the court on this subject. The court says "If this verbal agreement

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was actually made then the plaintiffs may recover on that agreement, although it is outside of the written order and bill of lading." This is at variance with the ruling at folio 46. The attention of the court was further distinctly called to this subject at fols 147-8.

Did the order contain the contract of shipment as between these parties? See plaintiff's evidence, also defendant's and Holt's evidence.

Was the bill of lading made out in pursuance of that order, and did it also contain the same contract?

We submit, therefore, that the admission of this parol testimony was error. That the refusal to strike out such parol testimony on motion of defendant, made in pursuance of the ruling at fol. 46, was error. That the charge of the court on the same branch of the case was also error.

II. We are justified from the plaintiff's evidence in saying there was not even a parol agreement by Stillwell to pay demurrage:

1. The plaintiff swears, "There was no agreement between me and Stillwell that he was to pay me demurrage—nothing was said about it."

2. The plaintiff's witness, Timmons, who went with Fisher to Stillwell's office, and is the only witness who testified to what took place there, except plaintiff and Stillwell, swears, "I can't swear that the replies of Stillwell were not made in answer to my own questions and to mine alone."

3. See Stillwell's evidence on this subject. We submit, therefore, that if the conversation was as detailed by Timmons (who seems to have been the spokesman on that occasion), it amounted to nothing more than the expression of an opinion by Stillwell, and cannot be made the basis of a contract between these parties on which to found the liability of the defendant.

4. Any verbal agreement by Stillwell was wholly unauthorized by the defendant, and was, if made by Stillwell,

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beyond and outside of his agency as the uncontradicted evidence shows.

The refusal of the court to charge as requested on this branch of the case and also the charge, we submit, were errors.

The agency of Stillwell for defendant, if anything, was a special agency to give orders on the Delaware & Hudson Canal Co., in writing, for cargoes of coal, to be shipped as per those orders, to the defendant at Syracuse. He had a right to contract as to the amount of freight, the size of the cargo, the kind of coal, and the like, all of which were stated in the order given, as a guide to the company in making out their bills of lading, but he had no right or authority to contract for the payment of demurrage, which was wholly an outside matter, nor to make any statements relative thereto to bind his principal.

The rule seems to be, "A general agent binds his principal by his acts, but an agent constituted for a particular purpose, and under a limited and circumscribed authority, cannot bind the principal by any act in which he exceeds his authority (*Beals agt. Allen*, 18 *Johns.*, 363; *Citing 3d Term R.*, 757; *Scott agt. McGrath*, 7 *Barb.*, 53).

Mr. Stillwell was a broker, procuring transportation for various parties in the way of giving orders in writing for cargoes to carriers; beyond that, in the present instance, he could not go, and swears he did not go. We submit, the court below erred on this point.

III. There was no contract between the parties binding upon either, until the cargo was loaded and the bill of lading signed. It was optional with the plaintiff to wait his turn or not, as he saw fit. He saw fit to wait, and has, we submit, no claim against defendant for waiting. He was able to ascertain, had he chosen to have done so, on his arrival at Rondout, how long it would be before he could be loaded; but he waived the inquiry, and waited his turn for the load and signed the bill of lading. That bill of lading is the one

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he took the cargo on, and further swears that he got that cargo only by reason of the order he took from Stillwell.

IV. The exception at fols. 82-4 was well taken, also fols. 85-86.

V. No damages in the nature of demurrage are, or can be, pretended in this case, because there is no proof that the delay in loading was occasioned through the fault or neglect of the defendant. The cases charge the consignee with such damages, only in cases of unreasonable delay in unloading,—that is after the cargo has been reported to him, and he thereby becomes charged with the duty of unloading within the time agreed upon, or, in the absence of such agreement, within a reasonable time (*Cross agt. Beard*, 26 N. Y., 85).

The rules of the company at Rondout required them to load every boat in turn, in the order of arrival, for the size of coal called for in their respective orders. If they failed to do this, they would themselves become liable to parties delayed.

Such a rule is reasonable, and no delay occasioned by its operation can be deemed unreasonable, since no boat was bound to wait its operation. And furthermore, this was a matter entirely beyond the knowledge and control of the defendant, for which he ought not to be made liable.

VI. The motion for a non suit should have been granted.

VII. The judgment should be reversed and a new trial granted, with costs to abide the event.

GOTT & GARFIELD, *for plaintiffs, respondents.*

I. The learned judge ruled correctly that the order addressed by Stillwell to the coal company did not constitute a contract between plaintiffs and defendant so as to preclude parol proof by plaintiffs as to what the contract actually was. The question is raised at folio 142 of the case. The paper was a private letter written by Stillwell, as agent, addressed

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to the agent of the coal company, at Rondout, containing such instructions to him as he saw fit to give. It was enclosed in an envelope, and on the outside addressed to the coal company. It was handed to one of the plaintiffs to deliver. He was not made familiar with its contents, nor was he asked to sign it. Neither was it signed by the defendant, or by any one on his behalf, meaning to have it operate as a contract (*Wood agt. Edwards*, 14 *Johns.*, 205; *Townsend agt. Corning*, 23 *Wend.*, 435; *Tucker agt. Wood*, 12 *Johns.*, 190; *Gage agt. Jaqueth*, *Opinion by MULLIN, J.*).

II. The court also properly held that the bill of lading was not conclusive upon the rights of the parties.

1. The bill of lading was made out and signed after the damages had been sustained.

2. And after the coal was actually shipped. And a bill of lading drawn under those circumstances cannot be said to merge the original contract in it. It would not apply to claim for damages already existing. The verbal agreement had been consummated and rights had accrued under it (*Bostwick agt. Baltimore and Ohio R.R. Co.*, 45 *N. Y.*, 716; *Corey agt. N. Y. C. R.R. Co.*, 45 *N. Y.*, 716).

If these two propositions are correct, then the requests to charge, with the refusals and exceptions, constitute no error.

III. The proof that the detention was the fault of the shipper aside from the agreement proved is very clear. At least it was a question for the jury.

IV. The objections and rulings at fols. 137, 139 & 141 are all covered by the stipulations found in the case at fols. 31 to 33. The judgment ought to be affirmed.

By the Court, MULLIN, P. J.—This action was brought in a justice's court by the plaintiffs to recover of the defendant damages for the detention of their canal boat, at Rondout, waiting for a load of coal to be carried for defendant to Syracuse. The defense was a general denial. The

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defendant was a dealer in coal in Syracuse and bought coal of the Delaware & Hudson Canal Company whose coal yard was at Rondout.

George W. Stillwell, Jr., who had an office 119 Broad street, New York city, was the agent of the defendant for the sole purpose of procuring boats to carry coal from Rondout to defendant at Syracuse.

The course of business was for captains, or owners of boats, desiring to carry a load of coal for defendant to Syracuse, to call on Stillwell, and he would give an order on the canal company to deliver to the bearer of the order a certain number of tons of coal, specifying therein the freight to be paid, with directions to advance on the freight and for tolls, a specified sum of money. The bearer of the order would carry it to the agent of the coal company, and the coal would be delivered upon it in its order.

One of the plaintiffs testified that he called on Stillwell on the 8th of October, and asked for a load of coal, Stillwell gave him an order: it was enclosed in an envelope: he never read it, and did not know its contents.

The witness was asked if he had a conversation with Stillwell, and he said he had; and when asked to state it, defendant's counsel objected to parol evidence of the bargain; as it appeared it was in writing, and the defendant's counsel offered to produce the order, and also the bill of lading, in order to exclude parol evidence of the contract. The objection and offer were overruled, and the witness said that he asked for a load of coal. He said he had some to go to Syracuse. He (witness) told him he wanted some for Syracuse, he (S.) said he would give him \$1 40 per ton and load right away as soon as he, witness, could get to Rondout. He wanted to load right away, so as to make another trip. He asked S. if he would have to lay at Rondout, he said the boat could be loaded as soon as it got there: he said he would give an order for three kinds of coal, so he, witness, could be sure to load right off.

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At a subsequent step of the case the order and bill of lading were put in evidence, and defendant's counsel moved to strike out the parol evidence of the contract.

It was impossible for the court to say upon the evidence of the plaintiff Fisher, before the written order was put in evidence, that it contained the contract between the parties.

The paper delivered by Stillwell was called an order. That term did not necessarily imply that it contained the contract. It was the act of one of the parties only, the contract was the act of both.

The court was right in receiving the parol evidence of the conversation between Fisher and Stillwell, and in refusing to allow the defendant to put in the written evidence, while the plaintiff was giving evidence.

I am of opinion the court properly refused to strike out the parol evidence as to the time within which the boat was to be loaded.

The order was not intended to embrace the whole contract: it was given in pursuance of part of it, and contained no more of it than was necessary to enable the coal company to know how much coal to deliver and for whom and the amount which it should advance.

The boat was detained at Rondout eight days before it got a cargo. Less than a day was required to load it when its turn came. It was proved that other boats arriving after the plaintiff's, were loaded before it. The detention was some days and the damages shown to be worth from \$12, to \$25 per day.

Demurrage, properly so called, is the compensation provided for in the contract of affreightment, for the detention of the vessel beyond the time agreed on for loading or unloading; (*See Abbott on Shipping*, 304; *Parsons' Mercantile Law*, 362; *Clendaniel agt. Tuckerman*, 17 *Barb.*, 184; *Cross agt. Broad*, 26 *N. Y.* 85; *Moss agt. Pesant*, 2 *Keyes*, 16.) The agreement for it must be expressed—it is not implied.

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If an agreement for demurrage, it was by Stillwell as agent for defendant and it was by parol.

To enable S. to bind the defendant by such an agreement, he must have had authority from the principal to make it. Not only is no such authority proved, but it is expressly disproved.

If the agent could make a contract for the payment of demurrage, it must result from his authority to employ vessels for the defendant.

I am not aware of any authority that recognizes any such power in such an agent. He is of course authorized to make any such contract as agents employed in the same business are authorized to make. Whether such agents are accustomed to contract for the payment of demurrage, we do not know, as no proof was given on the subject.

It would seem to be reasonable that such agents might agree upon the length of time the vessel should wait for a cargo, or for unloading, at the port of delivery.

It is important to the owner of the vessel, as well as the owner of the cargo, to know how long the vessel may be detained, as it may materially affect the price to be charged and paid for the freight.

But when, as in this case, vessels are compelled to wait their turn in being loaded, causing in one case a delay perhaps of one day, in another of ten days without fault on the part of the owner of the cargo, it might prove disastrous to him to permit his agent to bind him to load the vessel within any specified number of days.

It would seem that the plaintiff and other boat owners were under no obligation to delay until the vessel can be loaded, so that, after waiting a reasonable time, they may depart without the coal. When no time is fixed for loading or unloading it is to be done in reasonable time; and what constitutes reasonable time, is for the jury: and in determining what constitutes a reasonable time, the custom in force at the place of receiving the cargo, is to be taken into

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the account, so that, if vessels are required to wait their turn, the freighter is not liable for the detention of the vessel while it is waiting its turn (*Cross agt. Broad*, 26 N. Y., 85).

It would seem therefore that in the absence of proof of a custom for agents to agree with the owner of the vessel upon the lay days to be allowed the freighters, such authority cannot, in a case like this, be presumed, but it must be expressly proved. No such authority being proved, defendant is not liable on the express contract.

Although there is no express agreement for demurrage, damages in the nature of demurrage may be recovered against the owner of the cargo, when he improperly detains the vessel beyond a reasonable time for loading, or unloading (*See cases cited supra*).

Detention of a vessel while waiting her turn to load or unload, is not such a detention for which the owner of the cargo is liable (*Cross agt. Broad, supra*).

So that the defendant is not liable for damages in the nature of demurrage, unless he is responsible because the vessel is not loaded in her turn by the coal company.

It is said that vessels arriving after plaintiff's, were loaded before her, and she did not get her turn.

For that wrong, the defendant is not liable; but the coal company, or its agents, may be.

The detention for which defendant is responsible, is caused by his own act, and not by the act of others over whom he has no control.

When there is an express agreement by the freighter that the vessel shall be loaded, or unloaded, in a specified number of days, he is responsible for any detention beyond that, although produced by causes over which he had no manner of control (*See cases cited supra*).

This doctrine has no application to the case before us.

The judgment is erroneous and should be reversed and a new trial ordered. Costs to abide the event.

Kern agt. Rackow.

N. Y. SUPERIOR COURT.

WILLIAM KERN, and others agt. JOHN RACKOW.

On a motion to discharge a defendant from *arrest*, the order of arrest or a copy thereof, and the papers upon which it was founded must be presented to the court, an affidavit stating generally their contents is not sufficient.

A defendant cannot move for an order to discharge him from arrest, before he has been actually arrested by the officer.

Special Term March, 1873.

MOTION by defendant to vacate order of arrest.

VAN VORST, *J.*—Neither the order which is sought to be set aside, nor the papers on which it was granted are brought before me on this motion. The allegation in the affidavit of the attorney for the defendant, with respect to the papers he understands to be in the sheriff's hands for the defendant's arrest, do not apprise the court of their contents, nor by whom, when, or for what cause the order supposed to exist, was made.

Until there be an examination of the papers by the court it cannot be determined that the order was irregularly made, but the presumption would rather be in favor of its regularity.

Upon the vague statement of the defendant's papers, no relief can be granted him on this motion. He must bring before the court the order, or a copy with the affidavits and papers upon which it is founded.

The defendant has not yet been arrested, nor has any attempt been made to interfere with him by the sheriff.

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Section 204 of the Code provides that "a defendant arrested" may apply to vacate the order of arrest.

This would seem to imply that such relief could not be asked before the order is actually served, when defendant will be in a position to know the true grounds of his arrest and can intelligently bring his case before the court.

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N. Y. SUPERIOR COURT.

AUGUST A. RITTER, agt. MARGARET KREKELER, *et al.*AUGUST A. RITTER, agt. SAMUEL PHILLIPS, *et al.*

On an *appeal* from a judgment entered by the direction of a single judge to the general term of the same court no security is required, but if a stay of proceedings is desired, an undertaking must be given, the same as required on an appeal to the court of appeals.

Where an undertaking is filed at the time of the service of a notice of appeal for the purposes of a stay, which undertaking is disapproved, the appellant should move for leave to file and serve a new undertaking *nunc pro tunc* as of the time of filing the notice of appeal.

Special Term, February, 1871.

MOTION for leave to file a new undertaking on appeal from judgment of foreclosure, and to set aside all proceedings upon the judgment.

H. A. FROST *and* A. R. DYETT, *for the motion.*D. M. PORTER, *in opposition.*

FREEDMAN, J.—An appeal from a judgment entered upon the direction of a single judge to the general term of the same court under section 348 of the Code, is effectual without security. It is only when a stay of proceedings is desired that security must be given, as upon an appeal to the court of appeals (*Genter* agt. *Fields*, 1 *Keyes*, 483; *Davis* agt. *Duffie*, 8 *Bosw.*, 691; *Halsey* agt. *Flint*, 15 *Abb.*, 367; *Kitching* agt. *Diehl*, 40 *Barb.*, 433; *Niles* agt. *Battershall*, 18 *Abb.*, 162.)

The first notice of appeal is, therefore, still operative, and

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the second was a nullity. After the undertaking served in each case with the first notice had been disapproved, the appellant should have applied for leave to file and serve a new one, *nunc pro tunc*. Failing to make the proper motion, the several applications for a stay of proceedings, which have been made, were very properly denied.

But inasmuch as the appellant does now present a case, upon which relief may and should be granted to him, he may have leave, upon the conditions hereinafter named, to withdraw the second notices of appeal and to file and serve the undertakings filed and served with such notices, or new ones in place thereof, as of the day when the first notices of appeal were served and filed, with liberty, however, to the respondents to except to the sureties, &c., &c.

Upon the approval of such undertakings the sale is to be vacated and set aside, and all proceedings upon the judgment will be stayed.

The condition of his relief is, that the appellant in each case pay, within five days after the date of the order to be entered in conformity herewith, to the referee his fees and disbursements in making the sale, and to the attorney for the respondents \$10 costs for opposing this motion.

Order to be settled on two days notice.

The Charlotte, Columbia & Augusta R.R. Co., agt. Jesup.

N. Y. SUPERIOR COURT.

THE CHARLOTTE, COLUMBIA & AUGUSTA R.R. Co., agt.
MORRIS K. JESUP, *et al.*

It is only where an article is contracted for to be applied to a particular purpose, and in such manner that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, and not to his own, that there is an *implied warranty* that it shall be reasonably fit for the purpose to which it is to be applied.

Special Term, February, 1871.

DEMURRER to complaint.

FOSTER & THOMPSON, and T. C. T. BUCKLEY, *for demurrer.*

WARD, JONES & WHITEHEAD, *in opposition.*

FREEDMAN, J.—Where a known, defined and described article is actually supplied according to contract, there is not, as a general rule, an implied warranty that it shall answer the particular purpose intended by the buyer, although that may have been communicated to the seller (*Chanter agt. Hopkins, 4 M. & W., 393; Ollivant agt. Bayley, 5 Q. B., 288.*)

It is only where an article is contracted for to be applied to a particular purpose, and in such manner that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, and not to his own, that there is an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. (*Brown agt. Edgington, 2 M. & G., 279; Jones agt. Bright, 5 Bing., 533; Story on Sales, § 371.*)

The complaint does not set forth any such contract, and

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under the contract, which is pleaded, the acceptance of the goods and their retention, after a reasonable time and opportunity for examination had elapsed, must be held an admission of due performance by the seller, and a waiver on the part of the buyers of all defects in the quality of the goods (*Reed* agt. *Randall*, 29 *N. Y.*, 362; *Weaver* agt. *Wisner*, 51 *Barb.*, 641; *Leavanworth* agt. *Parker*, 52 *Barb.*, 135; *Sprague* agt. *Blake*, 20 *Wend.*, 64.)

Defendants are entitled to judgment upon the demurrer, but plaintiffs may have leave to amend upon payment of costs.

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N. Y. SUPERIOR COURT.

ANNA KNOOP, plaintiff, agt. LOUIS KAMMERER and JOHN C. LYST, defendants.

On a motion for a new trial on the ground of newly discovered evidence in this case, it did not appear that the evidence alleged to have been newly discovered went to impeach the credit of any witness or party, examined as a witness on the trial; that it did not relate to any new fact upon which evidence was not given on the trial, and what evidence there was stated and claimed to be material was merely cumulative. Motion denied.

Special Term, June, 1872.

Affirmed on appeal, January, 1873, upon the argument.

MOTION for a new trial on the ground of newly discovered evidence.

PHILIP F. SMITH, *for the motion.*

THOMAS S. MOORE, *in opposition.*

FREEDMAN, J.—This action is brought to recover the value of certain pictures taken from plaintiff, under process of court, directed against her husband. On the trial, plaintiff gave evidence of her title, of the manner and *bona fides* of its acquisition, and of the value of the property taken; she was severely cross-examined, but maintained her claim before the jury, who gave her a verdict of \$600. All questions of fact appear, on a review of the evidence, to have been fully and fairly submitted to the jury, and so well satisfied were the defendants with the charge of the court, that they took no exceptions to it, or any part thereof. They now move, however, for a new trial, on the sole ground of newly discovered evidence. Upon such motion, it is too well

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settled to require the citation of authorities that the evidence alleged to have been newly discovered must not merely go to impeach the credit of a witness, or party examined as a witness, on the trial, but that it must relate to some new fact upon which evidence was not given on the trial already had, and be so material and important in its nature as to induce a belief in the mind of the court entertaining the motion that, if proved to the satisfaction of a jury, it would control their verdict.

The new evidence disclosed by the moving papers does not come up to these requirements. Some of it is purely negative in its character and effect, and for that reason unavailable here, and the remainder, if true, and, for the purposes of this motion, its truth must be assumed, although the plaintiff has made affidavit to the contrary, merely goes to impeach certain portions of plaintiff's testimony, without destroying her right to a verdict of some kind. The very declaration sworn to by the witness John Staebuer to have been made by the plaintiff to the effect, that she had bought the pictures at a private auction sale, involves, when taken in connection with the other evidence presented by the case, a substantiation of plaintiff's claim of title.

It has been urged, however, and with a great deal of force, that the newly discovered evidence may, upon a second trial, materially aid the jury in arriving at a more correct assessment of the value of the pictures than has been had. But, as upon the first trial, a great deal of testimony was submitted on both sides as to such value, the said newly proposed evidence is, in its bearings upon that point, merely cumulative, and consequently insufficient, within the rule laid down by this court in numerous decisions, to authorize the granting of a new trial. It is true that the jury adopted almost the very highest estimate of value placed upon the articles by a number of witnesses, and a higher one than I, sitting as a juror, should have adopted.

But their finding upon this point was within the evidence,

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and, it being upon a disputed question of fact, was peculiarly within their province.

So it is equally true that the defendants have not, at any time, distinctly complained of the verdict as an excessive one, nor is their present motion made upon such ground.

Upon the whole case, therefore, as made, I can find no warrant for the disturbance of the verdict. The motion for a new trial must be denied with costs.

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COURT OF APPEALS.

DUNCAN McCOLL *et al.* agt. THE SUN MUTUAL INSURANCE
COMPANY.

The statute does not give the court, in which the trial of an issue of fact is had, power nor authority to issue a *commission* for the examination of foreign witnesses after trial and judgment in the action, although an *appeal* from such judgment is pending. This power can only be exercised *before* trial and judgment.

APPEAL from an order of the New York superior court, heard at the March general term, 1872.

Before MONELL, FREEDMAN *and* CURTIS, *JJ.*

THIS action was tried by the court and a jury, and resulted in a verdict for the plaintiff, upon which a judgment was entered on the first day of February, 1870. The defendants appealed to the general term, and the appeal is now pending. Another action by the same plaintiff against the Harmony Insurance Company to recover on another policy for the same loss was pending and untried, when in May, 1870, the plaintiff applied to the special term for a commission to issue to examine witnesses in both actions, and an order made allowing the commission in each of the actions. The defendants in this action ("The Sun Mutual") appealed from the order, allowing a commission to issue therein, having resisted the order below, on the ground that it could not issue after trial and judgment.

Judge MONELL delivered the opinion as follows:

By the court: MONELL, J.—This appeal presents the novel question: Whether an order allowing a commission for the examination of foreign witnesses can be issued after the trial and judgment in the action? There was no com-

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mon law right to take the deposition of a witness out of the State to be read at the trial. Parties in civil actions had the right to have the witnesses give their testimony in the view and presence of the court and jury. But it is provided by statute that the court may award a commission to examine a foreign witness upon interrogatories (2 R. S., 393), with a further provision, that the examination and depositions taken may be used in evidence on the trial of the cause. It would seem to be the only construction of the statute that the commission should issue before the trial, inasmuch as the evidence taken can be used only at the trial, and that, undoubtedly, is the correct construction.

The respondent's counsel suggested two reasons in support of the order. One was, that the word "pending," in the 12th section of the act, having been interpreted to extend to the final determination of the action (*Wegman agt. Childs*, 41 N. Y., 159), this action although tried, and now in judgment, is to be regarded as a "pending" action; but the 12th section provides merely, that if the action is pending in the supreme court, application for a commission must be made as therein prescribed, and in no way extends the time for its issuing. The other reason was, that the order was proper for the purpose of preserving evidence, which the party might lose by the death or absence of witnesses, in the event of the reversal of the judgment, and the ordering of a new trial.

If there was not to be a new trial, then the evidence could never be used, and it was a work of supererogation to take it. Every presumption is in favor of the correctness of the judgment. We must, therefore, assume that there was no error committed at the trial, and that the judgment will stand. The statute for causing testimony to be perpetuated, does not cover the evidence in this case. That statute applies to witnesses within the State, and cannot be extended so as to authorize the examination of foreign witnesses. The order appealed from is reversed with costs.

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From this decision the plaintiffs appealed to this court.

ALBERT MATHEWS, *for appellants, plaintiffs.*

This is an appeal from an order made at General Term of the N. Y. superior court, reversing an order of Special Term, allowing commissions to issue to take testimony of witnesses residing in Nova Scotia. The order differed from the usual order for commissions to take testimony, only in some particulars. It was made after trial and judgment, and pending appeal upon exceptions and motion for new trial. It authorized the examination of one or more witnesses, whose depositions had been already partly taken *de bene esse*, as well as of additional witnesses named therein, and also of such other witnesses as might be produced before the commissioners to prove certain specific facts described in the order. The General Term reversed the order on the "sole ground" of "want of power" in the court below to order a commission to issue after judgment appealed from in the action. Indeed, this was the only ground on which the order was appealable. Although granting of an order was discretionary—the refusal for want of power is error for which appeal lies (*Russell* agt. *Conn*, 20 N. Y., 81; *Tracey* agt. *Altmeyer*, 46 N. Y., 602). All other matters involved in the order rested purely in the discretion of the judge at Special Term.

First.—The statute under which the commissions issued is a remedial statute. It does not affect any vested rights of defendants. It is merely a statutory regulation of a matter of practice and procedure, relating to remedies of the parties to a suit at law. It was necessary to prevent a failure of justice. It should, therefore, be liberally construed to meet any contingency within the scope of the purpose of its enactment *People* agt. *Tibbets*, 4 Cow., 392; *Donaldson* agt. *Wood*, 22 Wend., 397, *By the* CHANCELLOR.—Legal hermeneutics, when applied to the construction of statutes,

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teach us to reject a construction which is contrary to natural justice and equity, or which will necessarily be productive of practical inconvenience to the community, unless the language of the lawgiver is so plain and explicit as not to admit of a different construction. To give a correct interpretation to the legislative will, where a statute was intended to remedy the injurious operation of a previous rule, or principle of law, the court should place itself in the situation of the legislature which passed the statute: that is, to contemplate, in the first place, the law as it previously existed, and the necessity and probable object of the change, and then give such a construction to the language used by the lawmakers in providing the remedy, as to carry their intention into effect, so far as it can be ascertained from the terms of the statute itself," *Weed agt. Tucker*, 19 N. Y., 433; *By the Court*, DENIO, J.—"The act in question is not at all of that character. It is a part of the legal arrangements for carrying on the government and providing for the administration of justice among the citizens of the state, and is remedial in its character. In such cases the rule is, that if the words of a statute are not explicit, the sense is to be gathered from the occasion and necessity of the law, the defect in the former law, and the designed remedy. It is to be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. It is to be construed liberally, in contradistinction from a merely verbal construction—largely and beneficially—so as to suppress the mischief and advance the remedy (*Dwarris*, 562; 614, 632). It is by no means unusual, as is said in a late case, to extend the enacting words beyond their natural import and effect in order to include cases within the same mischiefs, (2 *Younge & Jervis*, 196)."

Second.—The Revised Statutes (p. 393, § 11), provide that "the court may upon such terms as it shall think proper award a commission" "in any action in a court of law being a court of record." It prescribes only two conditions: 1st

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That "an issue of fact shall have been joined" in the action; 2d. That it shall appear that a "witness not residing within the state is material in the prosecution or defense of such action." There is no other word of limitation or restriction in this statute, or the amendment of 1862 (*chap. 375*). The other provisions in the statutes (such as relate to commissions when a default is taken, or such as provide for the mode of executing the commission and using the depositions when taken) do not in letter or spirit restrict the ample power conferred in the eleventh section in the original statute. Indeed, the amendment of 1862 (*chap. 375*) expressly authorizes a commission to issue "in any proceeding pending in any court of record."

I. The mischief sought to be provided against would be but partially remedied if the statute be construed with a limitation to cases where there has been a trial and is a subsisting verdict. Where there is an appeal there is always a possibility of a new trial. An appellant cannot be heard to gainsay the likelihood of such a result. A judgment appealed from is not absolute. The action is still "pending" (*Wegman agt. Childs*, 41 N. Y., 159). In such cases judgments cannot be set off against each other. If the judgment be reversed and verdict set aside there has been no legal trial or judgment. Not unfrequently, (as in this case,) judgments are reversed for want of sufficient evidence, which may be procured by commission, or examination of departing witnesses *de bene esse*, pending appeal. So also material evidence, (produced on the first trial, and upon which alone a recovery may be sustained upon a second trial) may be irrecoverably lost if it may not be taken and preserved under these statutes pending appeal; for the statute relating to taking testimony *de bene esse* of witnesses leaving the state (2 R. S., p. 391) is no broader in its terms than the one under discussion.

II. The only limitation suggested by the defendant or the court below, is that the depositions can only be used "on

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the trial of the cause." No other use is contemplated by the plaintiffs. The depositions were sought for to meet a contingency which the plaintiff apprehended and the defendant strove for, viz: a "trial of the cause," upon the issues of fact joined therein.

III. By granting a commission in such cases very great delay may often be avoided in the prosecution or defense of an action, and if a party be willing to take upon himself the burden and expense of procuring and preserving, from irreparable loss, evidence to meet a contingency he reasonably apprehends, the powers of the court should be exercised to aid him, and a statute designed to prevent a failure of justice should receive a liberal construction.

Third.—The order appealed from being, (in the respects complained of) made upon application to the favor of the court, and wholly dependent upon the exercise of its discretion, was not reviewable upon appeal in the court below. It does not "involve the merits" of the action, or "affect a substantial right" of the defendants. Such orders are not appealable (*Code*, § 349; *Thatcher* agt. *Bennett*, *N. Y. sup. ct.*, February, 1854, cited in *Voorhies' Code* of 1870, 555, note to § 349; *St. John* agt. *West*, 4 *How.*, 331; *Fitch* agt. *Livingston*, 4 *Sandf.*, 713; *Leighton* agt. *Wood*, 17 *Abb.*, 177; *Butler* agt. *Niles*, 3 *Robts.*, 645; *Bank of Commonwealth* agt. *Temple*, 39 *How.*, 439).

I. This proposition has been always steadily maintained, in numberless varying shapes, whenever the case has arisen. Where a new trial was granted on newly discovered evidence (*Seely* agt. *Chittenden*, 10 *Barb.*, 303). Where a sale under judgment of foreclosure was set aside (*Buffalo S. Bank* agt. *Newton*, 23 *N. Y.*, 160). Where books and papers have been ordered to be produced (*White* agt. *Munroe*, 33 *Barb.*, 650). Where pleadings have been amended (*N. Y. Ice Co.* agt. *N. W. Ins. Co.*, 23 *N. Y.*, 362). Where a judgment has been set aside for collusion (*Baldwin* agt. *The Mayor of N. Y.*, 2 *Keyes*, 387). Where alimony has been allowed a

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wife, *pendente lite* (*Moncrief* agt. *Moncrief*, 10 *Abb.*, 315). Where amendments and filing a bond *nunc pro tunc* have been allowed (*Sayre* agt. *Frazer*, 47 *Barb.*, 26). Where issues have been settled in an equitable action (*Wood* agt. *The Mayor*, 4 *Abb.*, *N. S.*, 152 ; see also *Voorhies' Annotated Code of 1870*, 534, note *d*).

II. The terms of the order, as respects the names of the witnesses, and the allowance of the re-examination of witnesses partly examined *de bene esse*, and the stay of proceedings, were all matters purely in the discretion of the court, dependent upon the peculiar circumstances of the case (*Vandervoort* agt. *Columbian Ins. Co.*, 2 *Johns. Cas.*, 137 ; *Ring* agt. *Mott*, 2 *Sandf.*, 683 ; *Rucco* agt. *Pearce*, 3 *Jurist*, 978).

(a) In *Ranney* agt. *Weed*, (1 *Barb.*, 221), where an application, to issue a new commission, to re-examine a witness who had been once examined, was denied, because there was no suggestion that he could give any additional evidence, it was not doubted the court had power to grant the application, and its refusal was the exercise of its discretion.

(b) In (*Mitchell* agt. *Montgomery*, 4 *Sandf.*, 676), where the application was made after one trial, and, the amount in controversy being less than the expense to be incurred, it was deemed unjust and inequitable to allow a commission to issue, the court regarded the exercise of the power as discretionary.

(c) In *Nicol* agt. *Columbian Ins. Co.*, (1 *Caines*, 345), the supreme court allowed a second commission to issue to re-examine a witness, as to a collateral fact to which his attention was not particularly called on his first examination.

(d) In *Fisher* agt. *Dale*, (17 *Johns.*, 343), the same court (A. D. 1820) allowed a second commission to issue to re-examine witnesses upon the mere suggestion that the witnesses could testify more fully to some facts as to which they had already been examined.

(e) In *Parker* agt. *Nixon*, (1 *Baldwin*, *U. S.*, 291, A. D. 1831), it was held not to be a matter of course to compel a

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party to name the witnesses to be examined on a commission. All depends on the discretion of the court to be exercised under the circumstances of the case.

(f) In *Winthrop* agt. *U. S. Ins. Co.*, (2 *Wash.*, *U. S.*, 712, A. D. 1807), it was held to be no objection to taking depositions abroad that the witnesses had been already examined and cross-examined under a previous commission while in the United States.

III. The courts of America and England have constantly issued commissions, both in cases at law and in chancery, without naming witnesses and without any special circumstances being shown beyond ordinary convenience.

(a) In the courts of this country it is not unusual so to issue such commissions (*The Infanta*, 1 *Abb. Admr.*, 266; *Heaton* agt. *Findley*, 12 *Penn.*, (2 *Johns.*), 304, 310; see also cases above cited).

(b) They are constantly so issued in England (*Carbonell* agt. *Bessell*, 5 *Simmons*, 636; *Bersford* agt. *Easthrope*, 4 *Jurist*, 104; *Rougemont* agt. *Royal Ex. Ins. Co.*, 7 *Vesey, Jr.*, 304; *Gow* agt. *Kinnersley*, 6 *Mann & Gr.*, 981; same case, 8 *Jurist*, 364; *Dimond* agt. *Vallance*, 7 *Dowl. Prac. Cas.*, 590, *ibid*; *Anonymous*, 3 *Jurist*, 385).

Fourth.—But if the matters involved in the order in question were legally the subject of review upon appeal, then it is insisted the order was properly granted by the court below. The plaintiffs were “regular” in all their proceedings, and there was no unexplained delay in making their application. The real owner of the ship, and the party in interest, being a resident of a foreign State, the affidavit for the motions was properly made by the attorney and counsel for the plaintiffs and real party in interest (*Demar* agt. *Van Zandt*, 2 *Johns. Cas.*, 69; *Murray* agt. *Kirkpatrick*, 1 *Cow.*, 210; *Beall* agt. *Day*, 7 *Wend.*, 513; *Deshaye* agt. *Persse*, 9 *Abb.*, 289, n).

I. The defendants were very confident of obtaining a new trial in the action by reason of the insufficiency of plaintiffs’

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evidence in respect to the matters involved in the commissions. The plaintiffs' counsel had furnished in the motion papers all the names of witnesses he was able to procure, after due diligence. The facts to be proved were well known at Sydney and Cow Bay, but the witnesses to prove them were masters of vessels, and, by reason of their migratory habits, it became difficult to name such as would be in those ports when the commissions would arrive there. The plaintiffs described and limited themselves to two classes of facts, to be proved by the unnamed witnesses, viz.: "custom of navigation," and "the loss and sale of the vessel."

II. The plaintiffs have a meritorious cause of action, and are entitled to the aid of all the powers and process of the court to procure all the evidence in existence, to establish beyond controversy all the facts necessary to uphold their claim. They are without fault and seek no improper advantage over the defendants. There is nothing unfair, nor a suggestion of anything improper in the testimony sought to be procured. Abundant reason is shown for not naming all the witnesses sought to be examined. It was practically impossible to do so. The plaintiffs are entitled to have the testimony preserved at their own expense, for further use, if needed. Upon the new trial granted (which defendants asked and expected) the testimony will be required, and the delay of procuring it will be avoided.

Fifth.—The plaintiffs being in all respects "regular" and without fault, they had a legal right to the order of the court directing the commissions to issue.

I. Under the statutes a party has a right to a commission when a regular application is made, unless he has previously forfeited such right by his misconduct or inexcusable neglect (2 R. S., 393, § 11, *act of 1862, chap. 375*; *Sparks agt. Barrett*, 5 *Scott's*, 402).

II. The power of the court to issue the commissions without naming the witnesses, and also after some of those named had been examined *de bene esse*, cannot be questioned. This

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has long been well settled by adjudicated cases, both in this country and in England. There is no prohibition against either mode of issuing commissions contained in the statute; nor any words of limitation which would exclude such order (2 R. S., 393, §§ 11 and 12). The former statute (from which the present is derived) expressly required the witnesses to be named in the commission. In the revision of the statute this restriction (with some others equally important) was purposely omitted, and all such matters were left to the discretion of the court (1 Rev. Laws, 520, § 11). Even under the old statutes it was held that the court had power to issue commissions without naming the witnesses.

(a) In 1801 a commission was allowed to be issued out of the supreme court without naming witnesses, although the court was so impressed with the want of merits in the application, that a stay of proceedings was denied (*Franklin agt. The United Ins. Co.*, 2 Johns. Cas., 68 and 285).

(b) Again in 1829, notwithstanding the letter of the statute as it then stood, (although specific objection was made by the late Mr. Cutting, as counsel, opposed to the application), a commission was allowed to issue without naming the witnesses (*Schaffer agt. Wilcox*, 2 Hall, 502).

(c) Under the present statute such commissions issue out of the supreme court, and the power to issue them is unquestioned (*McMahon agt. Allen*, 18 Abb., 289).

(d) In *Wright agt. Jessup*, (3 Duer, 642), where the application was denied by reason of laches in the applicant the power of the court was sustained.

(e) As an equitable tribunal, the court probably had full power (independently of the statute), to issue the commissions without naming any of the witnesses (*Brown agt. Southworth*, 9 Paige, 353, 2 Dan. Ch., 1 Am. ed. 1,099 to 1,102; *Forrest agt. Forrest*, 25 N. Y., 506; *Bowen agt. The Irish Presb. Corp. of N. Y.*, 6 Duer., 264; see also *Third Point, Subs. II and III*).

III. By the terms of the order the expense of executing

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the commissions was put upon the plaintiffs, and all detriment to the defendants was thereby obviated.

Sixth.—The order appealed from should be reversed with costs of this court, and the order of the special term should be affirmed with costs of appeal in the court below.

SAMUEL HAND *and* JOSEPH H. CHOATE, *for respondent,*
defendant.

First.—The order is not appealable.

Second.—The whole scheme of the statutes for the examination of witnesses on commission, contemplates the issuing of a commission only when an issue of fact is pending and untried, and in no case after a full trial and determination of all the issues of fact, by the finding of a verdict and the entry of judgment thereon (2 *Stat. Edm.*, 409–412; *Laws of 1862, chap. 375*).

I. It is only when an issue of fact shall have been joined, and solely for the purpose of disposing of that issue of fact, and to examine witnesses “material in the prosecution or defense of the action,” that the court is authorized to award a commission (§ 11).

Upon the settlement of the interrogatories, only “questions pertinent to the cause” are to be allowed (§ 12).

And the only use that can be made of the depositions so taken is, “to offer and use them in evidence on the trial of the cause” (§ 23).

And it being manifest that the statute, as originally expressed, did not authorize a commission to be issued after judgment, there is a supplementary section to meet the case of evidence of foreign witnesses being needed to meet the case of an assessment of damages, which provides that “if an interlocutory judgment shall have been obtained in any action, a commission may be awarded on the application of the plaintiff, in the like cases and in the same manner as if an issue of fact had been joined, and the depositions taken

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thereon may be used in evidence on any proceedings to assess the plaintiffs' damages, with the like effect as herein provided in case of trial " (§ 24).

And so the act of 1862 provides for the issuing of a commission after any default taken.

II. The cause having been tried, a verdict found and judgment entered, there is no issue of fact pending in the case. The issue of fact has been tried and disposed of, and no longer exists. No interrogatory as to matters of fact can now be pertinent to the cause. The future "prosecution and defense of the action" is upon the appeal, and the testimony of no witness can be said to be "material" thereto.

III. Nor can it be claimed that the order of the special term was right as an order to perpetuate testimony under the statute. The affidavits do not make a proper case for that relief, and it is not permitted, except to perpetuate the testimony of witnesses within the State.

IV. The court cannot presume that a new trial is to be had any more than that an action not yet commenced will be tried. Until the trial already had is reviewed upon the appeal, every presumption must be in favor of the determination already had.

V. The plaintiff has had his day in court upon the case; has, in fact, had his own time for preparation. He cannot be allowed to try first and prepare afterward.

As to the defendant, the maxim *n m debet bis vexari in eadem causa* applies as fully to protect him from the necessity of preparing for a second trial of an issue which now stands determined, as from being put to the second trial itself under the same circumstances.

VI. This case is a particularly gross one. The plaintiff having had four years for preparation, having examined all the witnesses he chose to, and having been once, by the special favor of the court, allowed to withdraw a juror for the purpose of making further preparation, and after the lapse of another year, having completed his proofs, he brought

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the case to trial, and the defendants resting the case upon his own testimony without offering proofs of their own, he obtained a verdict and judgment for his full claim.

In such a case, it is not only without authority of law, but in the highest degree oppressive and unjust to the defendants to put them to the further trouble and expense of examining a score of witnesses upon commission.

Therefore, the order should be reversed entirely.

Third.—The re-examination of the witnesses already examined is wholly irregular. No ground whatever is shown for it. It appears that they were fully examined before. No opposition even was offered by the defendants to the facts proved by them. There is no allegation of omission, mistake, neglect, or imperfection in their testimony as it stands upon the record taken *de bene esse* upon a full oral examination. Only the counsel who tried the cause for the plaintiff thinks that "they are not so full and explicit as they should be." Probably no witness was ever examined where conscientious counsel did not, upon subsequent reflection, think of better questions which might have been put—or of questions put which might better have been omitted.

It has long been the settled rule of practice that after the deposition of a witness has been taken upon a commission, and the commission returned, the party cannot have a new commission to re-examine the same witness, merely upon the expectation that he may now swear more definitely than before; in the absence of any suggestion that the witness has made a mistake, or that new evidence has been discovered (*Raney agt. Weed, 1 Barb, 220*). Still less should a party be allowed to re-examine witnesses who have already been examined orally *de bene esse* by the counsel of both parties.

Fourth.—The issuing of a commission to examine witnesses not named nor described is never allowed. Under special circumstances, which are not shown here, witnesses whose names may not be known, but who are described, may be so examined.

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The only pretext offered for this extraordinary application is, that although he has had five years to procure his testimony, and knew all the time in what class of persons to look for it, the plaintiff has recently been written to by his counsel for the names of the witnesses to prove his case, and his counsel received no answer, or only the name of one witness, by telegraph.

Here is a case of the grossest negligence, and the party applying for such an extraordinary order is always required to show due diligence in finding the names and residences of his witnesses (*Shafer* agt. *Wilcox*, 2 *Hall*, 502; *Wright* agt. *Jessup*, 3 *Duer*, 642).

In the latter case, it appeared that the case had been at issue for some months, and had several times been noticed for trial, and this court held "that the general rule that the witnesses must be named in the commission was never departed from, except under very special circumstances, and never when by reasonable diligence the names might have been ascertained; that the laches, in making the motion, was not excused in the affidavit, and therefore the motion was denied with cost.

(a) The affidavit does not show even the existence of any material witness among the unknown parties to be examined.

(b) This portion of the order is a mere fishing excursion to catch some shipmaster who, by possibility, may happen into Cow Bay, and be acquainted with the customs of that region five years ago.

The order appealed from should be affirmed with costs.

ANDREWS, J.—The order awarding a commission in this case was made at special term, upon the application of the plaintiffs, after judgment and after appeal therefrom by the defendants to the general term, and while the appeal was pending and undetermined.

The right of a party to an action, to have the evidence of

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witnesses taken upon commission, and the power of the court to award a commission, depends solely upon the statute.

The statute authorizes the court to award a commission for the examination of foreign witnesses whenever an issue of fact shall have been joined, and it shall appear that the witness to be examined is "material in the prosecution or defense," of the action (2 *Rev. Stat.*, 394, sec. 11).

In settling the interrogatories to be attached to the commission, each party may insert any question "pertinent to the cause" (sec. 12).

And the examination and deposition taken may be "used on the trial of the cause" (sec. 23)

We are of opinion that under this statute, where an issue of fact has been joined, a commission is not authorized to be issued, unless the issue of fact is depending when the application is made, and the right to a trial of the issue appears upon the record.

This is not the condition of a case pending on appeal after trial upon the merits, and after judgment. The issue of fact is then determined, and is merged in the judgment.

The reversal of the judgment may require a new trial of the action, but this event is uncertain.

There is no present right to a trial and there may never be such right, and the presumption is in favor of the validity of the judgment.

It cannot be made to appear upon the application in such case, that the witness whose examination is sought, "is material in the prosecution or defense of the action.

Its further prosecution depends upon the judgment of the appellate court.

If the right to award a commission exists, pending an appeal from the judgment, then it may be awarded although the appeal is pending in this court.

Such a power is not within the contemplation of a statute, and the power of the court in which the trial is to be

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had to issue the commission, can only be exercised before trial and judgment.

It may be that it would be in furtherance of justice to extend the statute so as to embrace causes like this, but it is to be considered that it would subject the prevailing party in the judgment to the trouble and expense of joining in the commission, with a view to a new trial, although judgment had passed in his favor.

The order appealed from should be affirmed with costs.

GROVER, *J.*, dissenting, RAPALLO, *J.*, not voting.

The People agt. The American Institute.

SUPREME COURT.

THE PEOPLE *ex. rel.* THOMAS GODWIN agt. THE AMERICAN
INSTITUTE of the city of New York.

Where a corporation in their by-laws adopt the rules in Cushing's Manual for the government of all debates of its members, and no other provision is made on that subject in the by-laws, Cushing's Manual must control the members of the corporation in that matter.

That provides that if offensive words are not taken notice of *at the time they are spoken*, but the member is allowed to finish his speech, and then any other person speaks, or any other matter of business intervenes, before notice is taken of the words which gave offense, the words are not to be written down, nor the member using them censured.

Therefore, where a member in debate, at a meeting of the corporation, uses what are considered offensive and improper words, which are not objected to or noticed at the time or during the meeting, he cannot be tried and expelled for using those words upon charges made at a subsequent meeting. Such expulsion is irregular and without authority.

Special Term, New York, April, 1873.

MOTION by relator for a mandamus.

S. G. COURTNEY, *for relator.*

E. N. DICKERSON, *for respondents.*

FANCHER, J.—The respondents were incorporated by an act of the legislature of the state of New York, passed May 2, 1829, and are owners of real and personal estate of large value. The relator was on the 12th November, 1846, elected a life-member of the corporation, and continued to hold such relation to the corporation until June 6th, 1872, when he was expelled for an alleged violation of the by-laws of the corporation.

The relator alleges, that his expulsion was without cause ;

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but the respondents assert that the cause of expulsion was sufficient, and that the proceedings of the corporation which involved the expulsion, were authorized by their charter and by-laws; and they further contend that their proceedings are not open to revision on mandamus.

By virtue of his membership an interest in the property of the corporation was vested in the relator, and he cannot be deprived of it, without his consent or due process of law. When he became a member of the corporation he assented to the by-laws adopted for its government, and he has no right to complain if there has been a fair and proper administration of the by-laws in his case, but if the by-laws have not been observed, he has been improperly expelled, and this court has the power, and should exercise it, to reinstate by mandamus (*The People ex. rel. Price agt. Am. Institute*, 2 Leg. Obs., 170; *The People agt. Medical Soc. of Erie*, 24 Barb., 577).

It is alleged that at a meeting of the institute, held on the 5th October, 1871, a resolution was adopted authorizing the trustees to purchase or lease the premises known as the Empire City Skating Rink, on the Third avenue.

The relator, with others, opposed the resolution at that meeting, prior to its adoption; and he, also, at the subsequent meeting, held on the 2d November, made an unsuccessful motion for an amendment of the minutes of the October meeting, relating to the action of the institute as to the rink.

At the meeting of November 2, 1871, a committee was appointed to investigate certain charges against the relators, presented at that meeting. From an examination of the charges it appears that he was accused of using language at the meeting in October "calculated to excite confusion and dissension among the members in violation of by-laws, art. xxii., sec. 16;" also that, at said meeting, "he did not, in speaking upon a certain question under debate, confine himself to the question, but wandered therefrom into indecorous

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language;" also that he "imputed improper motives" in that debate to certain members, and accused members of being improperly influenced in the matter of the resolution as to the rink.

The investigating committee reported that they found the charges sustained. At a subsequent meeting a special committee was appointed, under the by-laws, to try the charges, and the relator was summoned to appear for trial. The trial was had, and the trial committee in May, 1872, reported in favor of expelling the relator from membership in the institute.

The resolution was laid over to the meeting held on the 6th June, 1872, when it was resolved to vote by white and black balls on the proposed resolution of expulsion.

The vote was accordingly taken in that manner, when 64 voted in favor and 15 opposed to the resolution, and it was declared to be adopted.

The question is whether or not these proceedings were in accordance with the by-laws of the corporation?

Art. xxiv., sec. 20 of the by-laws, reads as follows: "The rule in Cushing's Manual shall govern all debates, except in cases herein specially provided for."

Cushing's Manual points out the procedure when action of a deliberative body is taken for disorderly words. The member is called to order, and his words reduced to writing by the clerk. The assembly then determine whether the member has been guilty of any offense, and whether further proceedings to punish him shall be had. The following paragraph follows: "232. If offensive words are not taken notice of at the time they are spoken, but the member is allowed to finish his speech, and then any other person speaks, or any other matter of business intervenes, before notice is taken of the words which gave offense, the words are not to be written down, nor the member using them censured. The rule is established for the common security of all the members, and to prevent the mistakes which must neces-

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sarily happen, if words complained of are not immediately reduced to writing."

This rule was not observed in the proceedings against the relator. It does not appear that his supposed violation of the rules of debate, were noticed by any action at the October meeting, where the offensive words were spoken. The first action was at the meeting in November following. As the meeting at which the words were spoken did not take any action concerning them, it was not competent for a subsequent meeting to take action in regard to them.

There was no by-law of the corporation to authorize any action in the matter at such subsequent meeting. The rule quoted from Cushing's Manual applies to the case, and by the 20th section of article xxiv., it contains the law applicable to the offensive words of the relator. Section 6 of the same article, contains a provision, under which the relator might have been called to order at the time the words were spoken; the penalty for which would have been that the relator should take his seat, provided the presiding officer declared him to be out of order.

The same section contains further provisions as to the course of proceeding in case a member thus pronounced out of order, should refuse to take his seat. But the return of the respondents does not set up that the relator was called to order, and refused to take his seat after being declared out of order; and it shows that the proceedings touching the relator, were not of that character and are not protected by the sixth section of article xxiv.

It is clear that the proceedings against the relator leading to his trial and expulsion, and which began in the November meeting, were unauthorized by the by-laws of the corporation, and his expulsion was therefore improper.

The motion for a mandamus must be granted.

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COURT OF APPEALS.

SAMUEL FORDHAM, respondent, agt. WILLIAM SMITH, appellant.

A Referee cannot disregard undisputed evidence, nor judicially infer something else to be true, of which there is no evidence.

A refusal to find facts of which there is evidence undisputed, and an exception to such refusal, raises a question of law to be heard by the court of appeals.

September, 1871.

PHILIP S. CROOKE, *for appellant.*

WM. J. OSBORNE, *for respondent.*

FOLGER, J.—This action is for the alleged wrongful conversion by the defendant of a promissory note made by him, and delivered to the plaintiff.

The learned referee has found that it came again, unlawfully, into the possession of the defendant, and was by him, in collusion with the payee, destroyed, or was converted to his own use by him.

The sole question presented by this appeal is whether there is any evidence on which the learned referee could base this finding.

It is to be observed, that no witness spoke upon the trial, save such as was called by the plaintiff.

The plaintiff must be held then to have thought each witness credible, and to have presented him to the court as truthful (*Thompson agt. Blanchard*, 3 Coms., 303-11).

Doubtless the learned referee had the right to have found any witness mistaken in his statements, and if there was a

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contradiction between his testimony and that of the other, or that of any other of the witnesses, have decided the question of the fact contrary to such statement. But he could not judicially deem some of them false and perjured, and so hold, and because so holding, infer therefrom that the truth of the matter was the reverse of what was testified to by the witness so deemed.

Now the defendant was by the plaintiff called as a witness, and testified that he knew nothing of the note, that he had not got it, that he had never seen it, since he had given it to Campbell, the payee of it, that he did not know what had become of the note, that he did not know what Campbell had done with it, that he had never seen it since.

And the payee Campbell being also called as a witness by the plaintiff testified to the defendant's declaration, that he had never seen the note after it was given.

Thus, there is positive testimony from a witness of the plaintiff speaking in court, and proof of the declaration of the same person given by the plaintiff, that the note did not again come into the defendant's possession and was not by him converted to his own use.

There is no direct testimony that it did come again into his possession, or that it was by him converted to his own use. There is no testimony of other facts, from which the learned referee has inferred that it was possible that it could have, and probable that it did. Thus, Campbell the payee of the note testified, that he went to the defendant's house and found him sick in bed, at the point of death, not expected to recover, that he (Campbell) had the note with him enclosed in an envelope, addressed to the defendant, that his intention in going to the house of the defendant was to give him the note, that without speaking to him on the subject he left the note at the house, with no person, but lying on a table in the sick-room in which there was no one but the defendant. The wife of the defendant and her brother were in the house in attendance upon the defendant. Further,

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the defendant on his examination, said that he had had no conversation with Campbell about this suit, and that he did not see how any suit could be brought against him. And it was also proven that he had made the declaration that he had never given Campbell any note.

Upon this testimony, and upon the fact that neither the wife of the defendant, nor her brother, was called as a witness to explain, the learned referee discredits and discards the positive and direct testimony of the defendant as a witness, put upon the stand by the plaintiff and by the plaintiff thus certified to be credible. A direct and positive negative from such a witness is allowed to be over borne by a possibility, from which is inferred a probability, and that probability deemed to be so certain as to warrant a finding and a judgment for the plaintiff.

It is possible that the sick man, at the point of death, not expected to recover from what seemed a mortal sickness, may have arisen from his bed and possessed himself of the note, of the presence of which in the room it is not shown that he was aware. It is possible that the wife or the brother may have found, upon the table, the envelope addressed to the defendant and upon his recovery have delivered it to him. But there is no such legal certainty or probability that either of these things took place, as should be permitted to overcome the out and out denial of the defendant if it is to be held as uttered with truthful purpose. Nor is the truthfulness of that denial so shaken by anything disclosed in the evidence as that it should be held not to be.

What is that evidence? The defendant did say, that he had never given this note to Campbell. It was an accommodation note, and he might, with that fact in his mind, well say that he had not given it, for in his judgment he had lent it. His saying as a witness that he did not see how any suit could be brought against him, is not strange. For, if as he asserts, he had not converted the note, this suit would not lie. And we find his counsel through successive appeals,

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contending that this was an accomodation note, and that as the plaintiff had never parted for it with anything of value, he was not a *bona fide* holder of it, and so not able to maintain a suit upon the note against the defendant. Even though counsel should be found in error in this regard, the defendant, relying upon counsel, may have been inoculated with that belief, and so believing have testified.

That the wife, or the brother of the wife, of the defendant, was not called to explain, is not incompatible with the defendants' position. They were as amenable to the process of the plaintiff as to that of the defendant, and the defendant had as much right to risk the weakness of the plaintiffs' case, as made by him, as the plaintiff to risk its strength, and so neither is more reprehensible than the other in not accumulating testimony upon the issue between them, although the defendant may be presumed to best know to what they would testify.

On the whole then, the case sought to be made by the plaintiff, is positively negatived by a part of the testimony by him produced. And from the other part of it, there is no inference legitimately to be made which will amount to a legal certainty or probability. And though it was in the province of the learned referee to presume and to infer, it was to presume and to infer only in such wise as was warranted by all the evidence before him. We think that he has done other than this, and has made findings and rendered judgment not at all to be sustained by the evidence before him, nor by any just and legal inference from it.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

FOLGER, *J.*, reads opinion for reversal and new trial. CHURCH, *Ch. J.*, ALLEN, RAPALLO and ANDREWS, *JJ.*, concur.

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SUPREME COURT.

GEORGE W. HEAD agt. SAMUEL F. SMITH.

Where a disputed question of fact has been fully submitted to the jury, their verdict thereon cannot be disturbed upon any opinion which may be entertained by the court on a review, as to which way the conflict should have been decided.

Where the plaintiff reads a portion of the defendant's answer to the jury as evidence to contradict the witnesses of the defendant, and the jury, notwithstanding, find the facts in accordance with the defendant's witnesses, the objection of the plaintiff that the defendant by his answer is estopped from setting up these facts, cannot prevail to disturb the verdict of the jury.

Where the supreme court at general term make a full and final decision in a cause, it is the duty of the circuit judges in that department, to follow the reasoning and conclusions therein, notwithstanding that the courts of a sister state may declare such general term decision erroneous and decide adversely to it.

Held, that the defense in this case, that the promissory note upon which the action was brought was procured by fraud, and that the plaintiff was not a *bona fide* holder for value without notice, could not be sustained.

Oneida Circuit, June, 1872.

MOTION for a new trial made by plaintiff, the verdict having been for the defendant.

S. J. BARRONS, *for plaintiff.*

F. F. WENDELL and J. T. SPRIGGS, *for defendant.*

HARDIN, J.—This action was brought to recover upon an alleged note of the defendant, which the plaintiff claimed to hold *bona fide*, and was heard by the court and jury and a verdict rendered for the defendant.

The plaintiff moves for a new trial on the minutes of the court, and suggests several grounds upon which he insists he is entitled to prevail.

The questions of fact in this action were submitted by the court fully, and no complaint is made in respect thereof.

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The court approvingly quoted (*Whitney* agt. *Snyder*, 2 *Lans.*, 477), and quite elaborately called attention to the opinion delivered by Mr. Justice TALCOTT, and after thus stating, the law submitted the questions of fact arising in the case to the jury. But the counsel for the plaintiff seeks to distinguish this case from *Whitney* agt. *Snyder*, but in order to do so, certain questions which were proper for the jury, must be determined against the verdict.

There was some evidence to establish, that when the defendant signed the note in suit he was not able to read very readily, that it was represented to him and that he believed that it was a certain other contract of an entirely different character.

The plaintiff gave evidence to the contrary, and the disputed question of fact was fully submitted to the jury, and their verdict cannot be disturbed upon any opinion which may be entertained by the court, as to which way the conflict should have been decided.

But the learned counsel for the plaintiff insists that the defendant by his answer is estopped from making the defense held to be good in *Whitney* agt. *Snyder*.

The answer may be conceded to be somewhat inconsistent with some of the evidence of the defendant, but as the plaintiff read a portion of the answer to the jury as evidence to contradict the witnesses of defendant, and they, notwithstanding, have found the facts in accordance with the defendant's evidence. The court upon the questions of fact cannot disturb the verdict. Besides the answer at folios 4-5 distinctly presents the defense which was sought to be established on the trial by the evidence of the defendant. It is there alleged "that at the time of the signing of said paper by the defendant and before the same had been signed, the said Peter Keck, through his agent, one Hunt (alias Hinkley), represented to the defendant that the paper here set out and which was part and parcel of a larger piece of paper, was an agreement or contract which would bind the defen-

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dant to pay or cause to be paid, once in each year, to said Peter Keck or his agent, twenty per cent of the net profits arising from the sale of a certain patent called, &c.;" and it was held at the circuit that the defense might be given in evidence under the allegations so found in the answer. It is not perceived that any error was committed in that respect.

The question involved in *Whitney* agt. *Snyder*, has recently been considered by the supreme court of Iowa, in *Douglas* agt. *Mattiny* (29 *Iowa*, 498, and reported 4 *American R.*, 238), and the opinion of BECK, J., would be ample authority to justify a new trial in this case, were there no other authority, but as long as *Whitney* agt. *Snyder* remains unversed, it is the duty of circuit judges in the same department in which it was pronounced, to follow the reasoning and conclusions to be found therein—as was done at the circuit in this case.

In *Hamilton* agt. *Vaught*, the supreme court of New Jersey discussed the suspicious circumstances and carelessness of the plaintiff in taking a note fraudulent in its inception and came to the conclusion that mere carelessness will not of itself impair the title of a *bona fide* holder (4 *Alb. Law Jour.*, No. 22, 353).

And the question in respect to the vigilance of a party taking commercial paper before due, was considered by the court of appeals of this State in two recent cases (34 *N. Y.*, 247, and 35 *N. Y.*, 65), and it is now settled that he does not owe to the party who puts such paper in circulation the duty of active inquiry to avert the imputation of bad faith. The charge in this case contains no principle at war with the doctrine of these two cases in our court of appeals.

The jury were instructed that the plaintiff was not bound to exercise extraordinary diligence when he took the note, and at the same time it was intimated that the case as disclosed by the evidence did not present any question for the jury in that respect.

The plaintiff also insists that the defendant by executing

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contemporaneously with the note, the certificate put in evidence, deprived himself of all right to make the defense sought to be established, and that he was estopped from saying that he was executing an entirely different instrument from the one produced.

He cites numerous cases upon the general doctrine of estoppel, but does not point out any evidence showing the plaintiff acted upon the certificate, or that he knew that such an one existed at the time he purchased the note in suit. If there was no evidence in the case except the note and the certificate, then the argument of the plaintiff's learned counsel would be received, but it must be borne in mind that the defendant alleged enough to establish that the note and the certificate were obtained by fraud, and were executed in the faith that the obligation was of an entirely different character, and the judge charged the jury that if they found that the certificate "was procured by fraud then the certificate ceased to have that force and significance that upon its face standing alone as a written instrument it would be entitled to;" that if the certificate was delivered without fraud or deception then it was to have the effect claimed for it by the plaintiff's counsel.

Surely, this certificate like all other instruments was liable to be attacked and shaken down by fraud, in the absence of any proof that the plaintiff had accepted usury upon it.

In *Lynch* agt. *Kennedy*, 34 N. Y., 152, PORTER, J. says, "it was affirmatively proved that the plaintiff was a *bona fide* holder, and that he purchased it on the faith of the defendant's written statement that it was business paper and that it would be paid at maturity" (3 *Keyes*, 609; see also 3 *Hill*, 216).

The case has been considered upon the supposition that the plaintiff was a *bona fide* holder for value without any notice of any defense existing prior to his purchase and payment for the note, but towards the close of the testimony there was a little evidence given tending to show that the

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plaintiff received a letter from the witness Snell, before he consummated the purchase of the note in suit, but as no question was submitted to the jury in respect to the *bona fides* of the plaintiff's ownership, it is not proper that the right of the defendant to defend should be considered otherwise than upon the supposition that the plaintiff was a holder for value *bona fide* (43 N. Y., 298).

The motion for a new trial is denied with \$10 costs.

Coffey agt. The Home Life Ins. Co.

N. Y. SUPERIOR COURT.

ELIZABETH R. COFFEY, respondent, agt. THE HOME LIFE
INSURANCE COMPANY, appellants.

There is no presumption of law that a person who commits *suicide was insane*, or that the fact of suicide is *prima facie* evidence of insanity (FREEDMAN, J. *dissenting. See his opinion*).

Aside from extrinsic facts and circumstances, the law presumes that every person who destroys his own life, is sane up to the very moment when he does the act which causes his death. It cannot therefore be properly said that the commission of that act, not only removes the presumption of sanity, but establishes a legal presumption that he was then insane (*Per BARBOUR, Ch. J.*).

General Term.

Before BARBOUR, C. J., FREEDMAN and SEDGWICK, JJ.

Decided February 1st, 1873.

GEORGE W. PARSONS, *for appellant.*

WHEELER H. PECKHAM, *for respondent.*

BARBOUR, C. J.—This was an action upon a life insurance policy which contained this condition: "In case he" (the person whose life was covered) "shall die by his own hand, * * * then the said company shall not be liable for the payment of the sum insured or any part thereof." Upon the trial, evidence was given tending to prove the following facts:

Just previous to the taking of the policy, Coffey, the person whose life was insured for the benefit of his wife, the plaintiff was insolvent and out of business, and had a wife and several children dependent upon them for their support.

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While thus situated he procured insurance upon his life to the amount of some \$40,000, mostly in favor of his wife, borrowing the money from his friends to pay the premiums thereon upon the false statement that he wanted the same for his expenses in carrying into effect some pretended land sales. A short time after he effected these insurances Coffey took his passage on a steamboat from Louisville to Cincinnati, where during the trip he went into his stateroom, and although the weather was quite warm, locked and fastened the door and windows. After the arrival of the boat at Cincinnati, the next morning, the door of the stateroom was broken open, when he was found in a comatose state, and the next night he died from the effects, as then appeared on examination, of an overdose of morphine. Other evidence was also given of circumstances which tended to prove that his death was caused by his own voluntary act in a sane state of mind, and in pursuance of a preconceived plan.

The judge before whom the cause was tried charged the jury *enter alia* thus: "When a man takes the life of another and alleges insanity as an excuse and defense, he is met by the presumption of law, that he was sane, and he must remove or rebut such presumption by showing affirmatively and by competent and sufficient proof that he was insane when he committed the deed. But when a man takes his own life, the presumption of law is otherwise. The law does not and cannot presume that a man in the full possession of his mental faculties, in that normal condition of mind which we call sanity, will deliberately take his own life, and therefore, so far as there is any presumption, it favors insanity at the time of committing an act of self-destruction. I therefore charge you as matter of law, that as affecting this case you must presume, that the deceased, when he took his life, was not in a sound state of mind, it is, however, but a mere presumption, and may be removed by evidence. But as I have said before, the burden of removing it lies upon

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the defendants, and it is for you to say whether they have done so."

The question raised by the exceptions to this portion of the charge of the learned judge, is somewhat novel and important. It has long been a well settled rule in the law of evidence, that where the deed or act of a party is sought to be avoided on the ground of his insanity, he will be presumed to be of sound mind until the contrary shall appear, and, therefore, that the burden of proving such party to have been insane rests upon him who alleges it. Indeed the rule that sanity is to be presumed until the contrary be proven, is a general one, applicable to all cases, and its reason is obvious.

It is founded upon the fact that general sanity is the natural and ordinary condition of the human mind, and that mankind, considered as a class or whole, are sane, (the exceptions being comparatively few and rare,) followed by the natural conclusion that each individual may well be assumed to be like the great mass of his fellow men in that regard, unless proved to be otherwise (1 *Greenl. Ev.*, § 42; 2 *ib.*, §§ 689, 873; 3 *ib.*, § 5; 2 *Kent's Com.*, § 451; *Bliss on Life Ins.*, § 378; *McNoghtin's Case*, 10 *Clark & Fin.*, 210; *Gardner agt. Gardner*, 23 *Wend.*, 526).

Aside from extrinsic facts and circumstances, therefore, the law presumes that every person who destroys his own life, is sane up to the very moment when he does the act which causes his death. Can it properly be said, then, that the commission of that act not only removes the presumption of sanity, but establishes a legal presumption that he was then insane?

No presumption that insanity exists in the case supposed, can be deduced from the mere fact that the death of the person was caused by his own physical act; for every legal presumption of a fact of that character must be founded and derived from some other fact or facts, with which it is usually

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or always formed, as the result of general experience and knowledge, to be connected in a certain relation (1 *Greenl. Ev.*, § 33).

There can be no doubt, however, that if courts were at liberty to assume as a fact established by experience, that all persons who intentionally deprive themselves of life are insane or diseased in mind, or even such a majority of them that it might properly be said that persons who thus destroy their lives are, as a general rule, insane, and that sanity is a mere exception, the legal conclusion that insanity or derangement of mind must be presumed in every case in which it appeared that the man intentionally caused his own death, would necessarily follow. But that fact is not so established. Not only is the history of the world in former times filled with instances in which great and sound minded men, such as Cato and Hannibal, have committed suicide, and where others have for the purpose of saving their estates from forfeiture submitted themselves to *peine forte et dure*, but the most learned men of the present day in this branch of mental science, not mere lawyers, are still groping for the truth in the twilight of doubt and peradventure. Indeed it is by no means settled, either among educated men or in the common mind, that even a majority of those who deprive themselves of life by their own physical act do so because of insanity. The fact cannot be legally presumed, therefore, that a person who has killed himself was not sane at the time, and consequently the charge in question was erroneous.

The most that can be said is that, inasmuch as many, and perhaps, most persons who destroy their own lives are insane at the time, the fact of such self-destruction, of itself, wholly removes the presumption of sanity (See *Cooper agt. Mass., &c., Ins. Company*, 102 *Mass.*, 227; *Terry agt. Mutual Life Ins. Company*, 1 *Dillon*, 403).

Judgment reversed with costs and new trial directed.

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SEDGWICK, J., (concurring). I am obliged reluctantly to differ with the learned judge in charging the jury, that the law presumed that a man was insane who killed himself.

First.—I do not think the law has made any presumption on that specific subject. The only presumption it has made, on the general subject, is that every man is sane, until the contrary is shown.

Second.—A judge, as such, cannot determine, nor has he the means to determine, whether an individual case of suicide is the result of insanity, especially when the cause of the insanity is to be confined to suicide. Therefore he cannot make a presumption on the subject, which is a generalization more or less perfect from individual cases.

I think the judgment should be reversed.

FREEDMAN, J., (dissenting). This is an action upon a policy of insurance for five thousand dollars made by the defendant upon the life of Benjamin S. Coffee in favor of the latter's wife, the plaintiff in the action. The policy, among other provisions to avoid it, contained a clause that, in case the assured should die by his own hand, the company should not be liable for the payment of the sum insured or any part thereof. In *Breasted* agt. *The Farmer's Loan and Trust Co.*, (4 Seld., 299), the policy contained precisely the same clause, and the court of appeals, in sustaining the decision of the supreme court in the same case (4 Hill, 73), and disapproving the English doctrine of *Borrodale* agt. *Hunter* (5 Man. & Gr., 648), and *Clift* agt. *Schwabe* (3 Man. & Gr., 437), settled the law of this state to be, that the phrases "death by his own hand" and "death by suicide" mean the same thing, and that both, unless qualified by some other expressions, import a criminal act of self-destruction, which can be committed only by the free will of a sane man.

The learned judge, who presided at the trial, was correct, therefore, in charging that, if Coffee, at the time he took the

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poison, was insane, if he was then laboring under either permanent or temporary insanity, he did not die by his own hand within the true meaning of that phrase, and that consequently there was no breach of the condition of the policy in that respect. Indeed no error whatever seems to have been committed in giving and refusing instructions to the jury, provided the learned judge was justified in refusing to charge, that the presumption of sanity attaches to the commission of suicide, and in charging, in place thereof, as follows :

“ The law does not and cannot presume that a man in the full possession of his mental faculties, in that normal condition of mind which we call sanity, will deliberately take his own life, and therefore, so far as there is any presumption, it favors insanity at the time of committing an act of self-destruction.

“ I therefore charge you as matter of law that there is no such presumption, and that as affecting this case you must presume that the deceased when he took his life was not in a sound state of mind.

“ It is, however, but a mere presumption, and may be removed by evidence. But as I have said before, the burthen of removing it lies upon the defendants, and it is for you to say whether they have done so.

“ The defendants to strengthen their position that the assured died by his own deliberate and criminal act, have given some evidence which they claim shows a motive, and, as they say, a sufficient motive for the criminal act. They have shown that the assured was in a pecuniarily embarrassed condition ; was in debt, and prosecuted and harassed by his creditors. They have also shown that at or about the time he effected the insurance in this case he procured other policies upon his life in other companies, all for the benefit of his wife, and amounting in the aggregate to forty thousand dollars. and they have further proved the substance of a con-

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versation between the deceased and a lawyer of Cincinnati, in which he sought information and advice respecting the legal effect of the condition against self-destruction in the policy.

"These facts and circumstances are submitted to you as tending to show, as is claimed, a motive, and thereby to repel the presumption of insanity, and it is for you to say whether you believe they are sufficient."

The question thus presented is an important, novel and difficult one. It is an open one in this state, and as the few adjudications made elsewhere upon it (*Nimick agt. The Mutual Life Ins. Co.*, 10 *Am. Law Reg.*, N. S., 101; *Terry agt. The Mutual Life Ins. Co.*, 1 *Dillon*, 403; *St. Louis Mutual Life Ins. Co. agt. Graves*, reported in 6 *W. P. D. Bush*, 268; and also in *N. Y. Daily Transcript of March 7th*, 1871, in which last named case the Kentucky court of appeals stood equally divided) are conflicting, it must be decided on principle. Fortunately in this case, its consideration is not embarrassed by other questions, which are usually connected with it and which relate to the different forms or species of insanity known to the law. For the charge has not been excepted to in that respect, nor has the definition of insanity, which was laid down for the guidance of the jury, been complained of in any manner. So, by omitting to move for the direction of a verdict, the defendant has conceded the sufficiency of plaintiff's evidence to carry the case at least to the jury.

Freed, therefore, from all embarrassments which the intervention of other questions might occasion, I think the examination of the point at issue may be commenced in the most fitting manner by considering for a moment what *life* is. The definitions of it given by philosophers and biologists are almost innumerable. But none of them commends itself so much to my mind as that given by Professor Herbert Spencer, who deservedly ranks in scientific circles as one of

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the greatest of modern thinkers. It is, that life consists in the definite combination of heterogeneous changes, both simultaneous and successive, in correspondence with external co-existences and sequences, or, in other words, in the continuous adjustment of internal relations to external relations. Consequently life is a continuous struggle. All vital actions, considered not separately, but in their ensemble, have for their final purpose the balancing of certain outer processes by certain inner processes. There are unceasing external forces tending to bring the matter of which organic bodies consist, into that state of stable equilibrium displayed by inorganic bodies; there are internal forces by which this tendency is constantly antagonized; and the perpetual changes which constitute life, may be regarded as incidental to the maintenance of the antagonism. So strong is this antagonism in the human organism that, while there is life, there is hope. The strength, in the natural sane man, of the love of life is indeed proverbial. Drowning men will catch at straws. All that a man has, will be given in exchange for his life.

From individual organisms thus struggling for life small aggregations were found, which soon felt the want of alliance and union with each other. This led to the formation of civil society, and the formation of that necessarily led to the establishment of government for the express purpose of preserving and keeping that society in order. Thus it came that every member of the society had to submit to a restraint by human laws of his natural liberty, to do as he pleased in his struggle for life and existence, and that judges, juries and all the instruments of the law came into being. Whenever it was found necessary or expedient, on account of new manifestations of the tendency on the part of the strong to subjugate the weak, in spite of existing law, to extend and perfect the prevailing system of law, it was done. In the course of the general improvement, which our sys-

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tem has thus undergone, the doctrine of presumptive evidence became engrafted upon it. The presumptions recognized by the law were founded, either upon the first principle of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. Under these circumstances it was found indispensably necessary for the proper enforcement of the whole body of the law, and essential to the safety of society, to establish the rule that, because sanity is the normal condition of the intellect, every man should be presumed to be sane, and that under the effect of such presumption, he, who seeks to avoid responsibility for an act on the plea that he was insane, and hence not responsible, should take upon himself the burden of proving that condition of his mind. The rule was accordingly established, and upon it has since been built the further one, that every sane person must be presumed to intend that, which is the ordinary and natural consequence of his own purposed act. Both these presumptions have ever since been firmly maintained and rigidly enforced. They are applied, and justly so, to the murderer, the homicide, the parricide, and the living criminal of every grade; for the experience of mankind has demonstrated that even the most atrocious crime is generally perpetrated in the course of the struggle for life and existence with the deliberate purpose of effecting by its commission an adjustment of internal relations to external relations. The presumption of sanity attaches, therefore, to a man in all his dealings with his fellow-men.

But in case of suicide the reason for the rule fails, and the necessity for its application disappears. Suicide is self-destruction. It is a self-inflicted violent and summary severance of relations, contrary to the ordinary laws of nature. It is a refusal to obey nature's law, and therefore, in the light of the present state of science, such an unnatural proceed-

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ing, that eminent men of great learning and research insist, that suicide is necessarily an insane act, while others contend that it is only *prima facie* evidence of insanity. The first proposition has never been accepted to any great extent; but the second is quite prevalent among scientific men and is daily gaining ground (*Winslow's Anatomy of Suicide*, ch. 11, 237; 1 *Esquirol's Maladies Mentales*, 559, 560; *Ellis on Insanity*, Lond. Ed., 1838, 114, 115; *Prichard*, Lond. Ed., 1842, 134, 141; *Bernard & Tuke on Insanity*, Phila. Ed., 1858; 88, 153, 202, 204, 331; *Dean's Medical Jurispr.*, 508, 509).

As the law should always keep step with the great truths, that are unearthed from time to time by science, the courts, upon these authorities, might well hold, and in my judgment should hold, in a case like the present that, while upon the whole case the burden of proof is upon the plaintiff to satisfy the jury that a loss has occurred under the policy, that is to say, that the person, whose life is covered by the policy, was insane at the time of the perpetration of the deed within the true definition of that term in the law, the presumption to be drawn from the naked and unexplained fact of suicide is, that the perpetrator at the time of the fatal act, was not in the possession of a sane and well-poised mind. Such presumption, like other presumptions of a similar character, is by no means conclusive, but may be removed by evidence.

It becomes neutralized and inoperative as soon as a motive for the commission of the act is shown by evidence. Upon this latter point the charge of the learned judge below is wholly unexceptionable.

As long as the presumption of insanity is thus applied and enforced, harmony will prevail between science and law, and no evil results can accrue to society. For the danger to be dreaded does not lie in the presumption, which, as such, may be rebutted and overcome by proof in each case, but in the

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doctrine of moral and emotional insanity and of temporary insane impulses, or, to be still more specific, in the vague and unsatisfactory definition sometimes laid down by the courts for these species of insanity and that class of impulses.

The fact which is generally alluded to, to sustain the opposite doctrine, that men of historic fame, such as Themistocles, Demosthenes, Hannibal and Cato committed suicide, without the imputation or suspicion of impelling insanity, cannot have much weight at this late day. Insanity, as now understood, was not known then, nor were the unerring and immutable laws of nature then known and understood to the same perfection as they are now. So it may also be safely assumed that each of these men shared the mythological notions of his age. The ancients seem very generally to have arrogated to themselves the right to destroy their own lives, whenever, in their judgment, it should be proper. Pliny was accustomed to term it the greatest privilege the gods had left in the power of men amid the calamities of human life. Justice ROBERTSON, of the Kentucky court of appeals very properly remarked of the historic men above referred to. "Without faith in a future state of retribution, they seemed, each and all, to prefer, on rational calculation, annihilation to hopeless torture or degradation." With the Christian era, however, came a change of views and of feeling in that respect, and Christian rulers set to work to suppress the barbarous practice. Thus it came that under the common law, suicide was declared to be a crime, and visited with punishment as such. As the criminal could not be reached himself, for the reason that, by the very act of suicide, he had placed himself beyond the reach of human punishment, the penalty consisted in denying the body of the criminal Christian burial and in the forfeiture of his goods to the king.

Nor can I appreciate the force of the reasoning of the learned chief justice in this case, in first denying that in-

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sanity can be presumed, and then holding that the most that can be said, is, that, inasmuch as many, and perhaps most, persons who destroy their own lives are insane at the time, the fact of such self-destruction, of itself, wholly removes the presumption of sanity. If suicide is the unnatural proceeding I have shown it to be, and the fact of self-destruction wholly removes the presumption of sanity, because many, and perhaps most, persons who destroy their lives are insane at the time, I can see no escape from the conclusion that the naked and unexplained fact of suicide must be *prima facie* evidence of the existence of insanity at the time of the perpetration of the act.

I have also carefully examined the recent case of *Fowler* agt. *The Mutual Life Ins. Co.*, (4 *Lans.*, 202), but do not consider it in point here. It seems to have been determined on the strength of the declarations made by the assured shortly before his death and which, in the judgment of the court, conclusively established the fact, that his subsequent suicide was entirely voluntary, deliberate, willful and with knowledge of its nature, character and consequences.

Being unable to discover any error in the instructions given and refused on the trial, and defendant's exceptions to the admission and exclusion of testimony by the court having been found, on examination, to be untenable, I am of the opinion that the judgment and order appealed from should be affirmed with costs.

Dietz agt. McCallum.

N. Y. SUPERIOR COURT.

FREDERICK W. DIETZ, agt. ARCHIBALD MCCALLUM, *et al.*

Where the defendants in this case procured a *settlement*, with the design to deprive the plaintiff's attorney of his costs, *held*, that they could not be permitted to have the benefit of a discontinuance or of a supplemental answer showing settlement without payment of the costs of the action up to the present time.

At Special Term, February, 1873.

MOTION by defendants for discontinuance of action, or for leave to serve a supplemental answer showing settlement.

MR. LAUTERBACH, *for the motion.*

G. STORMS CARPENTER, *opposed.*

FREEDMAN, *J.*—Although, as a general rule, an attorney has no lien for costs as against the adverse party until a judgment is entered, or at least a verdict obtained, and for that reason the parties are at liberty to settle the suit between themselves before verdict or judgment, yet where such settlement is privately effected with the design of preventing an attorney from obtaining his costs, the court will, notwithstanding the settlement, allow the attorney to go on and collect the costs in the action, that he may thereby secure himself. Where there is collusion, it can make no difference whether the damages are liquidated or not. The power of the court is not limited to cases where the action is brought for a liquidated sum, but it interposes upon the general principle that it is equitable and right to protect the attorney against a dishonest combination between the parties to de-

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prive him of the fruits of his labor and services (*Rasquin* agt. *The Knickerbocker Stage Co.*, 12 Abb., 329; *Keenan* agt. *Durfinger*, 19 How., 153, 12 Abb., 327, note; *McDowell* agt. *The Second Av. R.R. Co.*, 4 Bosw., 670; *Owen* agt. *Mason*, 18 How., 156; *Wood* agt. *The Trustees of the Northwest Presbyterian Church*, 7 Abb., 210, note).

In the two last named cases it was further said that a judgment procured by the attorney, subsequent to the settlement between the parties, for his taxable costs was regular, but that the judgment might be opened as matter of favor, to allow the defendant to try the case if he desired. That on such trial the defendant could not prove a settlement without having filed a supplemental answer setting it up, and that the court would allow such an answer, for such a purpose, to be filed only on payment of all the costs of the action up to that time.

As I am satisfied that the defendants in this case procured the settlement with the design to deprive plaintiff's attorney of his costs, I cannot permit them to have the benefit of a discontinuance or of a supplemental answer without payment of the costs of the action up to the present time. The motion is therefore granted, but upon the condition referred to, and unless such condition be complied with within twenty days, the motion is denied with \$10 costs.

Hochstetter agt. Isaacs.

N. Y. SUPERIOR COURT.

A. HOCHSTETTER, plaintiff, agt. SOLOMON ISAACS, defendant.

Where the allowance or disallowance of a proposed *amendment* to a pleading, is in the discretion of the *referee*, the exercise of that discretion, even if reviewable on appeal, will not be interfered with by the court on motion. But where the referee either has no power, or refuses to interfere because of a supposed want of power, the trial may be suspended and a motion made to the court at special term for such purpose.

Special Term, February, 1873.

MOTION for leave to amend answer during the pendency of a reference to determine the issues.

FREEDMAN, J.—Referees now have the same power to grant adjournments and to allow amendments to any pleadings, and to the summons, as the court upon the trial, upon the same terms and with the like effect (*Code*, § 272). As the subject of payments has been introduced into this case by the complaint and put in issue by the answer, the proposed amendment of the answer, by which it was sought to set up the precise amount paid, being material to the case, should have been allowed by the referee upon terms.

As the plaintiff insisted, however, that the referee has already passed upon this question, and that his disallowance of the amendment, if reviewable at all, can only be reviewed on appeal from the judgment, it becomes necessary to inquire into the power of the court to interfere on motion at this stage of the proceedings.

In *Woodruff* agt. *Dickie* (5 *Rob.*, 619), the majority of the general term of this court were of the opinion, that “referees are no longer officers of, or under the control of the court. They become by appointment an independent tribunal, having such powers as are given by statute, and their decisions are reviewable only on appeal from their judgments.

* * * * That as regards the allowance of amend-

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ments of pleadings, a judge, presiding at the trial of a cause with a jury, possesses all the powers of the court, and can allow them in the same manner and with the like effect as the court sitting in any other organized form. That the words used in the 272d section, giving to the referees the same power, '*as the court upon such trial*,' seem unnecessary, inasmuch as the court has no other, greater or less power '*upon the trial*' in respect to amendments, than at special term, or in bank, or otherwise."

These doctrines, which, however, were not necessary to the decision of that case, the supreme court used to follow. In *Union National Bank of Troy agt. Bassett* (3 Abb., N. S., 359), the general term of the third district held that the court at special term, during the pendency of a reference, has power to permit a defendant to amend his answer by setting up the defense of usury, although the original answer did not allege it. And in *Ford agt. Ford* (35 How., 322; S. C., 53 Barb., 525), the special term set aside an amendment allowed by the referee, on the ground that he had not the power to grant it at the trial, and that the motion should have been made to the court at special term.

In *Bennett agt. Lake* (47 N. Y., 93), the court of appeals, instead of entertaining the appeal and reversing so much of the order appealed from as granted relief in addition to that given by the referee, dismissed the appeal, upheld the power of the court as well as that of the referee, and decided that the allowance of the amendment by the referee and the granting of additional relief to the same party by the court upon a review, on motion of the other party, of the action of the referee, were both discretionary.

This last decision must be deemed to overrule in effect the doctrines advanced in *Woodruff agt. Dickie*; and as I am therefore at liberty to disregard them, I have after a careful examination of all the authorities arrived at the conclusion, that the rule has been correctly stated by Mr. Justice

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JAMES in *Ford* agt. *Ford* (*supra*), namely, that although on the trial neither a referee nor the court has power to allow the amendment of a pleading by inserting a new cause of action or a new defense, such amendment may be obtained by suspending the trial and applying on notice to the special term. The application should be made at special term, because the adverse party has not only a right to answer or reply to such amended pleading, but should also have a reasonable time within which to prepare for opposing the motion.

From all this it follows that where the allowance or disallowance of a proposed amendment is in the discretion of the referee, the exercise of that discretion, even if reviewable on appeal, will not be interfered with by the court on motion. And this is the precise question determined in *Woodruff* agt. *Dickie* (*supra*). But where the referee either has no power, or refuses to interfere because of a supposed want of power, the trial may be suspended and a motion made to the court at special term.

As in this case plaintiff's counsel has stated upon the argument that the referee had based his decision upon his supposed lack of power, the motion is granted upon payment of ten dollars costs and without prejudice to the proceedings already had and with leave to plaintiff to amend his complaint, if he should be so advised.

Winston agt. English.

N. Y. SUPERIOR COURT.

FREDERICK S. WINSTON, agt. STEPHEN ENGLISH.

The examination of a party, provided for in section 391 of the Code, is now regulated by Rule 21, and can only be had, before issue joined, either to enable the plaintiff to frame his complaint, or the defendant to frame his answer.

The affidavit upon which the application for an order of examination is based, must show the materiality of the discovery sought, for the purpose of framing the pleading; and if the materiality does not appear, the application should be denied.

The defendant who applies for such an examination, in order to frame his answer to a complaint which has not yet been served, cannot show the materiality of the discovery, because he does not know what the allegations of the complaint are

v

*General Term, March, 1873.**Before MONELL, FREEDMAN and CURTIS, JJ.*

THIS is an action for damages for the publication of several alleged libels. An order of arrest was granted upon an affidavit, and the defendant was arrested. The summons was served at the same time. Immediately the defendant applied for, and obtained an order for the examination of the plaintiff, with a view to ascertaining information respecting the alleged libels upon which to frame his answer. The plaintiff moved to vacate this order, as having been improvidently granted, upon the ground that the examination was not wanted for any legitimate purpose, and that it could not be had until the complaint had been served, as it could not till then appear in what respects the discovery could be material. Chief Justice BARBOUR heard and granted the motion to vacate the order of examination, and from that order the defendant appealed to the general term.

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THOMAS DARLINGTON, *for defendant, appellant.*

JOHN K. PORTER *and* ROBERT SEWELL, *for plaintiff, respondent.*

By the court: MONELL, J.—Upon the return of the summons, issued by a judge of this court, requiring the plaintiff to appear and be examined *before* trial at the instance of the defendant, under section 391 of the Code, it was shown, by affidavit, that although the action had been commenced by the service of a summons, no complaint had been served upon the defendant; and it is understood that the decision at the special term was put upon the ground, that until the complaint was served upon the defendant there was nothing upon which the plaintiff could be examined.

But the defendant, upon his appeal from the order made at special term setting aside the summons for the plaintiff's examination, insists that he has an absolute right, *at any time after the action is commenced*, to take the plaintiff's examination, and that the court has no discretionary power over the matter.

Whatever may have been the views of this and of other courts, as to the right of examination at any time before the trial, even before issue joined or complaint served (*see McVickar agt. Greenleaf*, 4 Robt., 657), these views must, I think, now yield to the modifications in the law which have been made since that and other similar decisions were rendered.

The convention of judges, convened pursuant to chapter 408 of the laws of 1870 (*Vol. I.*, 951, § 13), had power to revise, alter, abolish and *make* rules, which, it was declared, should be binding upon all courts of record, so far as they might be applicable to the practice thereof.

It will be seen that the restrictive words in a similar provision in the Code (*Code of 1849*, § 470), "*not inconsistent with this act,*" are left out of the act of 1870.

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But I do not think it was intended to remove such restriction, or to authorize the making of any rule which might conflict with the provisions of the Code, or abridge or impair any right or remedy given by it.

The power, however, did extend to the adoption of all necessary and proper rules, to regulate the practice in actions and proceedings in all courts of record.

In accordance with that power the present twenty-first rule of court was adopted, and it requires that the application for the examination shall be upon affidavit, disclosing the nature of the discovery sought, which discovery, it must be averred, is required to enable the party to *frame his complaint or answer*, or to prove his case or defense, &c.

The rule, it will be seen, provides—*First*. For the examination of the defendant to enable the plaintiff to frame his complaint. *Second*. Of the plaintiff to enable the defendant to frame his answer; and, *Third*. Of either party after issue.

The rule follows in effect the construction by this court of the 391st section of the Code, in *McVickar* agt. *Greenleaf* (*supra*), so far as it permits the examination *before issue*, but by necessary intendment limits the right to the purposes specified.

The limit thus put upon the examination, namely, for a plaintiff to frame his complaint, or for a defendant to prepare his answer, is in accordance with the true intent of the statute, and does not, in my judgment, conflict with any of its provisions.

Whatever may be the right, therefore, to have the examination at any time, the application must conform to the rules, and it must be made to appear that the examination is required for one of the purposes specified.

If it does not, or if the court cannot see that the examination is material in aid of the prosecution or defense, the application should be denied.

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In this case it was an attempt by the defendant to examine the plaintiff. It could not be said to be necessary to enable the defendant to prepare his answer, for until the complaint was served he could not know what the alleged cause of action was or could be, nor what he would have to answer; nor could it be seen that it was material in aid of a defense until an issue had been framed.

It was therefore a question properly addressed to the power of the court, and as the defendant has not brought himself within any of the specified cases, authorizing the examination, the decision of the court, at the special term, setting aside the summons, was correct.

I have not found it necessary to examine the other question, namely, as to the right to require the plaintiff to testify against himself in an action of the nature it is said this is. That is a question, which, as it seems to me, does not now properly arise.

The order should be affirmed with costs.

FREEDMAN, *J.*, concurred.

CURTIS, *J.*—The defendant's affidavit states that this action is brought for damages for alleged false and malicious publications of and concerning the plaintiff. It further appears that the defendant is in the custody of the sheriff of the city and county of New York, under an order of arrest granted in the action. It appears by an affidavit of the plaintiff's counsel that no complaint has been served in the suit. The defendant obtained an order to examine the plaintiff, under section 391 of the Code. An order was granted on the plaintiff's application, to show cause why this order to examine should not be vacated. On the hearing the order to examine was vacated.

From this order the defendant appeals.

The right to examine a party to an action at the instance

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of the adverse party, at any time after the commencement of the action, is clearly conferred by the Code. That this is an absolute right, and not subject to the discretion of the court, is held in various decisions in this court (*McVicker* agt. *Greenleaf*, 4 *Rob.*, 657 ; *Fullerton* agt. *Gaylord*, 7 *Rob.*, 559 ; *Duffy* agt. *Lynch*, 36 *How.*, 509).

It was urged on the argument that the force of this provision was somewhat modified and affected by the 13th section of chapter 408 of the laws of 1870, and the adoption of 21st rule of the supreme court by the convention of judges, which met pursuant to the requirements of that law. The 13th section of the laws of 1870, is as follows :

“ All rules of the supreme court now in force, not inconsistent with the constitution or any statute of the state, shall remain in force until abolished or altered by the general term justices, the chief judges of the superior court of cities, the chief judge of the court of common pleas of the city of New York, and of the city court of Brooklyn, in convention assembled at the capitol in the city of Albany. A convention of such justices and chief judges shall be held at the place aforesaid on the first Monday in August, eighteen hundred and seventy, and every two years thereafter ; and such convention shall revise, alter, abolish and make rules which shall be binding upon all courts of record, so far as they may be applicable to the practices thereof.”

The 21st rule of the supreme court is as follows :

“ The application for an examination under § 391 of the Code, shall be upon an affidavit disclosing the nature of the discovery sought, to enable the party to frame his complaint or answer, or to prove his case or defense upon the trial, and how the same is material in aid of the prosecution or defense.”

I am unable to see that the legislature attempted to confer any power upon the convention of judges to alter or nullify, in any degree, the law, or that this rule No. 21,

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adopted by the convention, adds to or restricts, in any way, the operation or effect of section 390 and 391 of the Code.

Even if any modification of these sections had been attempted, by inserting provisions to that effect in a rule, it would have been inoperative, as the constitution of the State does not authorize the legislature to delegate any law-making power to a convention of the judges (*Barto agt. Himrod*, 3 N. Y., 491).

The Code, by directing that the party shall "be examined as a witness," and "subject to the same rules of examination as any other witness," limits the examination to what is material and relevant to the prosecution or defence. To carry out and give effect to these provisions of the law, this court has indicated, at special term, that the affidavit upon which the application for examination is made shall disclose what is requisite in respect to the action, to enable the court to properly apply and enforce the directions of the Code (*Duffy agt. Lynch*, 36 How., 509; *Greene agt. Hendon*, 7 Rob., 463).

The supreme court rule No. 21 is substantially in accordance with this view. It is framed for the purpose of enabling the court to have the information before it that will enable it to enforce the provisions of section 390 and 391 of the Code, and also to restrict the examination of the party to that which is relevant and material, and which mode of examination is alone authorized under these sections.

When the motion for the examination is made by the defendant, the affidavit, in order to show the nature of the discovery sought, should set out the complaint or its material allegations, and the nature of the defense, and where no complaint, as in the present action, has been served, but an affidavit stating the cause of action has been made, and served with the order of arrest on the defendant, pursuant to sections 181 and 184 of the Code, then the defendant, in his moving affidavit, should set it out, or its material allegations,

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together with the nature of the defense. It is only where this information is thus presented that the court is able to limit the examination to that which is relevant and proper, and thus give effect to the provision of the Code that the examination of a party shall be governed by the same rules as that of any other witness.

The affidavits on this motion show that the action is brought for damages for alleged false and malicious publications of and concerning the plaintiff, and that the nature of the discovery sought by the examination of the plaintiff is to obtain information in regard to a great variety of alleged transactions and occurrences.

It does not appear that these matters, in respect to which this examination of the defendant is sought, have any relation, direct or indirect, with the alleged publications for which the action is brought.

It nowhere appears in the motion-papers what those publications were, or what subjects even they touched upon. The most careful examination furnishes no information.

The defendant does not set out the matters complained of by the plaintiff, either as contained in the plaintiff's affidavit, made to procure the order of arrest, or otherwise. The court is left without the means of knowing whether the examination sought is an inquiry into the past life and acts of the plaintiff, or in respect to matters pertinent to the action. It has no means of causing the examination to be conducted pursuant to the requirements of the Code, and restricting it to such matters as are relevant, material and proper.

In this view of it, and upon the present papers, the order appealed from should be affirmed, with costs, but without prejudice to the defendant's taking out another one, founded upon a proper affidavit.

Kamp agt. Kamp.

N. Y. SUPERIOR COURT.

ANN C. KAMP agt. HENRICH KAMP.

The power of the court to award alimony is not restricted to the time of rendering the decree of divorce, it may be allowed afterwards by supplemental order, judgment or decree, although the decree of divorce contained no provision for alimony.

When a motion for alimony has been made and denied, and it does not appear on what grounds, such denial will not embarrass a subsequent motion, or be deemed "*res adjudicata*," when sufficient grounds are shown to exist for granting the motion.

Where a receipt was given under seal expressed to be "in full for all my claims for alimony," no permanent allowance having in fact been granted, the seal is not conclusive and the receipt is open to let in evidence of the intent and meaning of the parties at the time it was made.

Special Term, 1872.

APPLICATION for alimony.

This action was instituted by the wife against the husband for a divorce, on the ground of the husband's adultery.

A judgment dissolving the marriage was entered on the 3rd day of August, 1852, but did not contain any provision for alimony.

The further proceedings in the action and upon the judgment will appear in the following findings of the referee to whom upon this motion, it was referred to take proofs.

His findings are as follows:

That on the third day of August, 1852, a decree was duly entered in this action whereby the marriage between the plaintiff and defendant, was dissolved, on the ground of adultery on the part of the defendant.

That upon the face of such decree no provision was made allowing alimony to the plaintiff in any amount.

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That on the same day that the decree was made the plaintiff received of the defendant the sum of three hundred dollars in money and gave her receipt therefor in the following words and figures to wit:

“New York, August 3rd, 1852.

“Received from Henrich Kamp, the sum of three hundred dollars in full, for all my claims against him for alimony and costs of suit of divorce.”

That the three hundred dollars was paid to the plaintiff with the full knowledge and consent of her next friend and attorney and that the whole amount was appropriated to her own use, and that there is nothing in the case to show fraud, or misunderstanding as to the object, purpose, or effect of the payment which occurred at that time.

That at the date of the decree the defendant had no property nor any certain fixed income.

That he is now worth the sum of fifteen thousand dollars, all of which has been accumulated since the dissolution of the marriage but at what particular period, or in what ratio since that time does not appear.

That the plaintiff has no property at this time of any considerable amount.

That after the decree was entered in this cause, a motion was made to open the same, so as to provide alimony for the plaintiff which motion was denied.

That such refusal was on or about December 22, 1854, and that the plaintiff has received no other or further allowance than the three hundred dollars before mentioned.

From the testimony taken and the findings of facts, thereupon, the referee was of opinion that the plaintiff could not be allowed alimony.

He had much doubt whether the court could make any supplemental order, no provision having been made in the judgment for present or future alimony or permission given to apply under it, but he founded his opinion, mainly upon

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the effect to be given to the receipt given by the plaintiff, on the day the judgment was entered, which the referee regarded as a satisfaction of all claim for future alimony.

The present motion is upon exceptions to the referee's report.

HATCH, VAN ALLEN & SMITH, JR., *for plaintiffs*.

I. An application for permanent alimony may be made either at the time of rendering a decree of divorce, or if the decree contains no provision for alimony, at any time afterwards during the lifetime of the parties (*Sec. 58, 236, 3 R. S.; Bish. on M. & Div. and cases cited; Shotwell agt. Shotwell, 1 Sm. & M., Miss., 51; McKanaher agt. McKanaher, 3 Yates, Pa., 56; Bowman agt. Worthington, 6 Am. Law Reg., N. S., 621*).

(a.) Upon rendering the decree of divorce, the right of the plaintiff to alimony became absolute (*Forrest agt. Forrest, 3 Bosw. 667, affd. 25 N. Y., 501*), and passed as incident to the decree (*Ib.*).

(b.) The word *may* in the sentence "the court may make a further decree or order" is to be construed as meaning *must*, or the imperative *shall* (*See act of 1813, vol. 2, sec. 5 199; Sec. 58, ib.; Darby agt. Condit, 1 Duer, 600; Cooke agt. Nat'l. Bank, 3 Abb. N. S., 339*).

II. Alimony is "an allowance which a husband *by order of the court* pays to his wife for her maintenance" (*Bish. on M. & D. 549*). The court never granted to the plaintiff any allowance; the defendant could not acquire that which had no existence, nor the plaintiff release what she did not possess; the receipt in evidence is a mere release of the alimony and costs due at the time the receipt was given (*1 Edwards, 34*).

The sanction of the court being essential to a grant of alimony, any secret arrangement entered into by the parties,

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made without such sanction is invalid, and the court may break through the invalid agreement at any time (*Kirby* agt. *Kirby*, 1 *Paige*, 568; *Cooledge* agt. *Cooledge*, 1 *Barb. Ch.*, 77; *Rogers* agt. *Rogers*, 4 *Paige*, 516; 5 *Paige*, 509).

III. The motion made in 1854 to "open the decree of divorce," "in order to provide alimony," was properly denied. The divorce was final and conclusive and as shown above (*Pt. 1*), the statute provided amply for allowance of alimony, without disturbing the decree. The denial of that motion is no bar to the present application (*Butts* agt. *Burnett*, 6 *Abb., N. S.*, 302).

IV. The poverty of the plaintiff for the past twenty years is established, and her inability to pay the expense presents a good reason or excuse for the delay in applying to the court. Mere delay in claiming her rights, is no reason why they should be refused (3 *Bosw.*, 667).

FLORENCE LEARY, *for defendant.*

MONELL, J.—The power of the court to award alimony, is not restricted to the times of granting the judgment of divorce, but the allowance may be made afterwards by supplemental order or judgment; such I think is the construction to be put upon the words of the statute, that if a decree dissolving the marriage be pronounced, the court may make a further decree or order against the defendant to provide such suitable allowance to the complainant for her support as to the court may seem just. "It is usual to make provision for alimony in the judgment of divorce; but if circumstances exist at the time the judgment is pronounced, rendering it inexpedient to make the allowance at that time, and the situation of the parties afterwards are changed, it would be proper for the court to grant the appropriate relief by a supplemental decree.

It does not appear upon what ground the motion to open

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decree, so as to provide for alimony made in December, 1854, was denied.

And unless the disposition of that motion is to be considered as *res judicata* it cannot embarrass this application. I cannot give to it the effect of *res judicata*. It may have been, and I have the right to presume that it was, decided upon facts before the court, which were deemed insufficient to allow of alimony being made at the time, and not for the want of power in the court to award it after judgment.

The principal objection to this application, however, arises upon the effect which is to be given to the receipt signed by the plaintiff on the day the judgment of divorce was entered, and which is as follows:

“New York, August 3d, 1852.

“Received from Henrich Kamp, the sum of three hundred dollars in full, for all my claims against him for alimony and costs of suit of divorce.

“ANN CATHARINE KAMP.” [L. S.]

This receipt is held by the referee to operate as a satisfaction of all alimony, and, therefore, as a bar to this motion.

I cannot give to it such effect.

The seal affixed to it is of no consequence, under the statute (2 R. S., 406, § 77) it is open to let in all such proof as would be proper, if it was not sealed (*Stearns* agt. *Tappin*, 5 *Duer*, 294).

And if necessary, therefore, to resort to extrinsic evidence, the testimony taken by the referee, establishes, I think, that the sum paid was received by the plaintiff as payment of alimony to that time, and was not intended to bar a future claim.

But even if it should have given to it, the effect of a release under seal, and hence operate as a discharge of the claim for alimony, it cannot reach forward so as to defeat a future application when the changed circumstances and condition of the parties appeal to the court for relief.

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After the payment and receipt of the three hundred dollars, it is probable that the plaintiff was debarred from demanding any other or further sum for previous alimony, and so far it was a release and discharge of the defendant.

But there is nothing in the receipt, which in terms or by necessary inference or implication, releases the defendant from future alimony, if the court, in the exercise of its powers, shall deem it proper to make a further judgment or order for its payment.

If the receipt is to be interpreted in the light of the evidence it cannot have given to it any greater effect, than to discharge the claim for alimony down to the time of entering judgment.

Having determined that the court has power to make a supplemental order for the payment of alimony, and that neither the former decision nor the receipt should bar the application, the only remaining consideration is addressed to the discretion of the court.

About twenty years have passed since the marriage contract of these parties was dissolved, during all which time the plaintiff has maintained herself by her own efforts. For that long period of time the defendant has contributed nothing towards her support, so long as her health was sound, she seems to have been willing and has been able to sustain herself, and has thus relieved the defendant of a burden, which the court might have made him bear during all the intervening time.

It appears that the plaintiff has now reached the age of upwards of sixty-three years, and is in feeble health, unable by reason of her advanced age and bodily infirmities, to labor for her own support.

These facts furnish a sufficient ground for granting her such an amount of alimony, as in view of the pecuniary ability of the defendant, shall be proper.

As the papers before me do not furnish the requisite proof

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and the referee not deeming it necessary to take any, it must be sent to a referee to take proof on this subject.

The plaintiff may have an order to that effect, containing the same provision for payment of fees, &c., by defendant, as was inserted in the previous order of reference.

Upon a reference to Hon. JAMES C. SPENCER, the sum of \$1,000 was awarded to the plaintiff as a yearly allowance, commencing from the date of his report, which was afterwards confirmed by the court.

DIGEST

OF

ALL THE DECISIONS

CONTAINED IN THE FOLLOWING REPORTS.

44 *Howard's Pr. R.*; 48 *N. Y.*; 61 and 62 *Barbour's R.*;
and 5 *Lansing's R.*

A.

ABATEMENT AND CONTINU- ANCE.

1. An action is not abated by the death of a sole defendant, if the cause of action survives or continues. (*Livermore* agt. *Bainbridge*, 61 *Barb.*, 358.)
2. In such a case the proper construction of section 121 of the Code, and the right rule of practice, is that the representatives of the deceased defendant, if they have an interest in the suit, may have an order to continue it. (*Id.*)
3. Such representatives have an interest, if the deceased defendant has set up a counter-claim, in his answer, upon which they want judgment in their favor. (*Id.*)
4. The fact that, usually, the court would permit the plaintiff on the record to discontinue the action, in such a case, notwithstanding the interposition of a counter-claim, does not militate against

this view; there being no absolute right to such discontinuance. (*Id.*)

5. That is a question of practice, which is within the discretion, and under the control, of the court. (*Id.*)
6. When the representatives of a deceased sole defendant have the right to have the action continued, they may apply for an order to that effect, under the 121st section of the Code. (*Id.*)

ACTION.

1. An assignee for the benefit of creditors can maintain an action, in his individual character, to recover a claim due the assignor; he is not required to sue as trustee. (*Hoagland* agt. *Trask*, 48 *N. Y.*, 686.)
2. A promise made by an individual, upon a valid consideration, to pay money to a third person, will sustain an action by the latter, in his own name, against the promisor. (*Hall* agt. *Robbins*, 61 *Barb.*, 33.)
3. The defendant having control, as agent

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or attorney, of a claim against the United States government, applied to the plaintiff to buy it, and, thereupon, made certain representations to him, in respect to the validity of the claim, and the probability of its payment, and the plaintiff upon the faith of such representations, purchased and paid for the claim; and the representations turned out to be false, and the claim was rejected:

Held, that the plaintiff could maintain an action to recover back the purchase money paid. (*Shedd* agt. *Montgomery*, 61 *Barb.*, 507.)

4. An action will not lie to restrain the erection, for public purposes, by a city corporation, of a bridge within the limits of the city, upon one of the streets thereof, at the suit of a land owner whose property is not taken or touched. (*Swett* agt. *The City of Troy*, 62 *Barb.*, 630.)

5. In such a case, the land owner is not entitled to compensation for the indirect or consequential damages arising or apprehended from the exercise of the power of eminent domain. (*Id.*)

6. And an injunction should not be granted until the final hearing, when the subject of compensation can be considered: especially where the defendant is able to respond, in case the plaintiff shall establish a legal claim to damages. (*Id.*)

7. Under the provisions of section 2 of chapter 29 of Laws of 1865, the town of Solon, in Cortland county, became entitled to certain bounty moneys from the State, for excess of years' service of men furnished by it under calls of the president of the United States, made prior to December 19th, 1864. These moneys were erroneously paid to a supervisor of the town of Homer, in that county, for its benefit, and so appropriated by him.

Held, that they might be recovered in an action brought by the supervisor of the former town, in its behalf, against the town. (*Hathaway* agt. *Town of Homer*, 5 *Lansing*, 267.)

8. The fact that the bounty money originally paid for the men, and which the State refunded, was the money of the county paid to its volunteers, and that they were credited to the county by the United States authorities and not to the town, and afterward the money was paid to the county by the plaintiff's town, and the men applied on its quota, does not affect the right to recover. (*Id.*)

9. The defendant purchased from a third person, to whom plaintiff had entrusted it, a county treasurer's certificate for a bounty bond belonging to the plaintiff, and obtained the bond from the county treasurer.

Held, that the plaintiff could not recover from the defendant the value of the bond, after demand duly made. (*Osby* agt. *Conant*, 5 *Lansing*, 310.)

10. *Held*, also, that there was no foundation for an action in the nature of tort by the plaintiff against the defendant. (*Id.*)

11. It seems an action will not lie at the suit of a child, born after the making of the father's will, in which it is not mentioned and unprovided for by settlement, to recover from children born before the will any portion of advancements made to the latter; but that the action in such case is, under the statute (2 R. S. 97, § 76; 1 R. S., 754, § 23), to compel distribution, and to determine what, if any, portion of the testator's estate devised to the children who have received advancements shall belong to them. (*Sanford v. Sanford*, 5 *Lansing*, 486.)

ADVANCEMENTS.

1. Where a testator has a child, born after the making of his will, and dies leaving such child unprovided for by any settlement, and neither provided for, nor in any way mentioned, in his will, the rights of such child, in respect to the testator's real and personal estate, are the same as they would have been if his father had never made a will, and had died intestate. (*Sanford v. Sanford*, 61 *Barb.*, 293.)

2. In no case can a child, born after the making of a will by his father, recover of any brother or sister, born before the will was made, any portion of any advancement made by his father, in his lifetime, to such brother or sister. (*Id.*)

3. When a parent conveys land to his child, without asking or receiving any consideration therefor, the presumption is that it is an advancement to the child, though the deed recites a money consideration, and contains an acknowledgment of it. (*Id.*)

4. Small, inconsiderable sums of money, occasionally given to a child to spend, or to defray expenses in traveling, or to pay for small presents, and the like, should be deemed to have been given "without a view to a portion or settle-

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ment in life," as contemplated by the statute, and are not to be regarded as advancements. (*Id.*)

5. But a considerable sum of money, given to a son, to enable him to start in business, is *prima facie* an advancement. (*Id.*)
6. It seems the rights of a child born after the making of a father's will, and not mentioned in it, under the statute (2 R. S., 65, § 49; *id.*, 456, § 62, &c.) attach to advancements made prior to the will. (*Sanford v. Sanford*, 5 Lansing, 486.)
7. When a parent conveys land to his child, without asking or receiving any consideration, the presumption is that the gift is an advancement, though the deed recites a money consideration and contains an acknowledgment of payment. (*Id.*)
3. A considerable sum of money, given to a son to enable him to start in business is *prima facie* an advancement; otherwise with inconsiderable sums, given occasionally in the way of spending-money and the like. (*Id.*)

AGREEMENT.

1. On an executory contract, by parol, for the sale of corn, sound corn is to be delivered, and if that which is delivered is not sound, the purchasers are not bound to accept. If, after delivery it is found to be unsound, they may return the corn, and refuse to complete the contract. (*Lawton agt. Kiel*, 61 Barb. 558.)
2. Such a contract, until performance, is void by the statute of frauds. Neither party is bound to complete it. (*Id.*)
3. But the parties are at liberty to ratify the agreement by performance; and the delivery of the property, or the payment of the money, under the contract, will operate to make valid a contract which otherwise could not be enforced. (*Id.*)
4. A mere negotiation, between the parties to a contract, for an amicable settlement of a disputed claim for damages, on account of the breach thereof, will not have the effect, in the absence of any agreement on the subject, to alter, or postpone, the legal rights of the parties as they existed when the breach took place. (*Hewitt agt. Miller*, 61 Barb. 567.)
5. After a settlement between the parties, and the giving of a note by the defendants to the plaintiffs for a sum agreed

upon, but during the same interview, the defendants agreed that, in case a certain shipment of lumber, made by them, which had not yet arrived, should prove on arrival, to contain less than 149,013 feet, at which amount it had been invoiced, the defendants would make good the deficiency:

Held, that this agreement, being subsequent to, was not merged in the settlement; and that an action would lie, upon it, to recover the amount of a deficiency in the quantity of lumber shipped. (*Smith agt. Holland*, 61 Barb., 333.)

6. *Held, also*, that the agreement to make good any deficiency in the quantity of lumber, was upon a good consideration. (*Id.*)
7. To make forbearance a valid consideration for a promise, there must be a binding agreement to forbear, either for a definite time or for a reasonable time. And the time of forbearance, in the latter case, must be alleged, that the court may see it was for a reasonable time. (*Perkins agt. Proud*, 62 Barb., 420.)
8. An agreement, made with a sheriff, by a person interested in property levied on, that if the former will delay a sale of such property he will pay and discharge the judgments, and satisfy the executions, and will indemnify and save the sheriff harmless from all loss, costs, damages and expenses that he may sustain or suffer in consequence of such delay, is illegal and void. (*Id.*)
8. A written contract, in its caption, named "Charles W. Weeks" as one of the parties; in the body, he was called "the said Charles Weeks;" and in the subscription, at the end, he, as well as the other party, employed only the initials of his Christian name. In neither the body of the contract nor in the signatures, was there any indication that it was the contract of a co-partnership firm. At the date of the contract "C. W. Weeks" was a partner in a firm doing business under the name of "C. W. Weeks," but the matters included in the contract did not relate to the partnership business. And there was no proof that the other party to the contract knew that "C. W. Weeks" represented a partnership firm, until after the execution of the contract. The contract was drawn by Weeks, and in all the correspondence, &c., relating to it, the personal pronoun "I" was employed by him; the words "firm," or "we" not at all.

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Held, that this was the individual contract of C. W. Weeks, and not that of the firm of which he was a member. (*Marvin* agt. *Buchanan*, 62 *Barb.*, 468.)

ALIMONY.

1. The power of the court to award alimony is not restricted to the time of rendering the decree of divorce, it may be allowed afterwards by supplemental order, judgment or decree, although the decree of divorce contained no provision for alimony. (*Kamp* agt. *Kamp*, ante, 505.)
2. When a motion for alimony has been made and denied, and it does not appear on what grounds, such denial will not embarrass a subsequent motion, or be deemed "*res adjudicata*," when sufficient grounds are shown to exist for granting the motion. (*Id.*)
3. Where a receipt was given under seal expressed to be "in full for all my claims for alimony," no permanent allowance having in fact been granted, the seal is not conclusive and the receipt is open to let in evidence of the intent and meaning of the parties at the time it was made. (*Id.*)

ALTERATION OF INSTRUMENT.

1. A material alteration made in an instrument, *e. g.*, a mortgage, without the consent of the mortgagor, either by the mortgagee, or by some other person; after delivery thereof, and while the same is in the possession or custody of the mortgagee, has the effect of destroying and annulling the instrument. So held as between the parties to the mortgage. (*Marcy* agt. *Dunlap*, 5 *Lansing*, 365.)

AMENDMENT.

1. Where the allegations of breaking and entering the close of plaintiff were clearly upon the face of the complaint mere surplusage, *held* that there was no error committed in so amending the complaint as to allow the true cause of action therein stated to remain. (*Moran* agt. *McClearns*, ante, 30.)
2. It is the well stated rule that it is pretty much a matter of course to permit parties to amend their pleadings before trial, when the amendment will produce no delay of the trial, nor work any especial hardship to the adverse party. The terms imposed are usually the payment of the costs of the motion, and such other costs and expenses, if

any, as the party will lose by reason of the desired amendment.

Held, on this motion, that the defendant be allowed, under the above rule, to amend his answer by setting up the statute of limitations. (*Gilchrist* agt. *Gilchrist's Ex'rs*, ante, 317.)

3. It is the duty of the Court to put statutory defenses, such as the statute of limitations, usury, &c., upon the same footing with other legal defenses. (*Id.*)
4. A referee has no power on the trial to allow a defendant to withdraw a second defense in the answer, consisting of a counter-claim, upon which he commences a cross-action against the plaintiffs, and then allow him to interpose a second defense to the answer in the original action, as an amendment thereof, by inserting substantially, but in a different form, the same counter-claim again, claiming \$130,000 damages; and all this without notice to the plaintiffs or their attorney, except on the motion to amend the answer. (*Livermore* agt. *Bainbridge*, ante, 357.)
5. Where the allowance or disallowance of a proposed amendment to a pleading, is in the discretion of the referee, the exercise of that discretion, even if reviewable on appeal, will not be interfered with by the court on motion. But where the referee either has no power, or refuses to interfere because of a supposed want of power, the trial may be suspended and a motion made to the court at special term for such purpose. (*Hochstetter* agt. *Isaacs*, ante, 495.)
6. The Supreme Court may allow an amendment to a notice of appeal to the Court of Appeals from an order granting a new trial, where the time for appealing has expired, by inserting therein, *nunc pro tunc*, an assent that "if the order be affirmed judgment absolute may be rendered against the appellant." (Code, § 11, sub. 2), where the notice has been given in good faith and the omission was through mistake. (*Mott v. Lansing*, 5 *Lansing*, 516.)

APPEAL.

1. An order granted on terms upon an application to show cause why the defendants should not have thirty days in which to make and serve a case, after default, is not appealable. (*Kiersted* agt. *Orange & Alexandria R. R. Co.*, ante, 379.)
2. On an appeal from a judgment entered

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- by the direction of a single judge to the general term of the same court no security is required, but if a stay of proceedings is desired, an undertaking must be given, the same as required on an appeal to the court of appeals. (*Ritter* agt. *Krekeler*, ante, 445.)
3. Where an undertaking is filed at the time of the service of a notice of appeal for the purposes of a stay, which undertaking is disapproved, the appellant should move for leave to file and serve a new undertaking *nunc pro tunc* as of the time of filing the notice of appeal. (*Id.*)
 4. The caption to the findings of the justice before whom an action to determine the title to real property was tried, was as follows: At a Special Term of the Supreme Court for motions and chambers business, held at chambers, at the City Hall, in the city of New York. It was objected, that the cause was not tried at any term of court, but before a judge out of court. This objection was not taken below: **Held**, 1st. That such an objection would not be permitted to be raised in this court for the first time. 2d. That it sufficiently appeared that the cause was tried at a special Term, held at the place for holding courts in the city of New York, and it would not be assumed that it was not a regular court for the hearing of all Special Term business, in the face of the fact that the parties, without objection, went to trial. (*Fisher* agt. *Hepburn*, 48 N. Y., 41.)
 5. An order setting aside a judgment is appealable to this court. (*Id.*)
 6. In an action tried by the court, or by a referee, a refusal to find a material fact, of which there is legal proof, and where there is no proof to the contrary, nor proof of facts or circumstances showing its improbability, is an error of law, and if a request so to find is made, and there is a refusal and exception, a proper question is presented for consideration in the Court of Appeals. (*Beck* agt. *Sheldon*, 48 N. Y., 365.)
 7. Where a new trial is granted an action tried by a jury, and the record shows that questions of fact were properly before the general term for decision, and that the order for a new trial may or could have been based thereon, this court will not review it for the purpose of reversal. Resort cannot be had to the opinions of the General Term, but it must be ascertained and determined by the record alone, whether the order was granted on questions of fact or of law. (*Durning* agt. *Kelly*, 48 N. Y., 433.)
 8. No appeal lies to this court from an order denying a motion for a new trial on ground of surprise or newly-discovered evidence. The question is one of discretion with the court below. (*Donley* agt. *Graham*, 48 N. Y., 658.)
 9. An order of general term in an equity action, sending the case back to the referee before whom it was tried, to decide upon the question of costs, cannot be reviewed in this court. (*Taylor* agt. *Root*, 48 N. Y., 687.)
 10. Costs in an equity action are in the discretion of the court, and the exercise of this discretion cannot be reviewed. (*Id.*)
 11. From an order made at a special term, confirming a report of commissioners of estimate and assessment for opening avenues, or public places, in the city of New York, an appeal lies to the general term. (*Matter of the Commissioners of Central Park*, 61 Barb., 40.)
 12. An order to stay proceedings, being discretionary, is not appealable; especially when the motion is granted upon terms. The terms never can be reviewed. (*Smith* agt. *Levy*, 61 Barb., 496.)
 13. Where, upon appeal from a decree of a surrogate, it appears, on a review of all the facts and circumstances of the case, that although improper evidence was received by him, yet there was sufficient testimony of a proper character to authorize the decree, such decree will be sustained notwithstanding the error. (*Matter of Paige*, 62 Barb., 276.)
 14. Under section 353 of the Code, which requires that upon appeal from a judgment rendered by a justice of the peace, the appellant shall, within twenty days after judgment, serve a notice of appeal, "stating the grounds upon which the appeal is founded," the appellate court cannot reverse the judgment, upon grounds not stated in the notice of appeal. (*Avery* agt. *Woodbeck*, 62 Barb., 557.)
 15. By limiting his grounds of error to certain specified points, the appellant impliedly admits he has no other. (*Id.*)
 16. Thus where the appellant, in his notice of appeal, fails to enumerate, among the errors complained of, the fact that the justice had not jurisdic-

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tion, he will be deemed to have waived that objection, and be excluded from insisting, on appeal, that jurisdiction is not shown to have been acquired by the justice. (*Id.*)

17. If there be any informality in the process, issued in a justice's court, or as to the constable who served it, it lies with the party appealing to make it appear. This he can do by making the objection in his notice of appeal, in the proper form, and obtaining a return from the justice, stating the defect. The onus of showing error is with the appealing party. (*Id.*)

APPRAISAL OF PROPERTY TAKEN FOR RAILROAD PURPOSES.

1. The testimony annexed to the report of commissioners appointed to appraise property taken for railroad purposes, pursuant to statute, is to be considered a part of the report, for the purpose of a review of the commissioners' proceedings. (*Matter of Rondout and Oswego Railroad Companies* agt. *Deyo*, 5 *Lansing*, 293.)

ARREST.

1. Where the complaint and affidavit contain facts from which the judge who granted the order of arrest (for libel) became judicially satisfied that a cause of action existed, and that it was not one of a trivial character, and it cannot be said from the proofs presented upon the motion to vacate the order of arrest; that the discretion of the judge was erroneously exercised, the motion to vacate the arrest will be denied. (*Blakelee* agt. *Buchanan*, ante, 97.)
2. On a motion to discharge a defendant from arrest, the order of arrest or a copy thereof, and the papers upon which it was founded must be presented to the court, an affidavit stating generally their contents is not sufficient. (*Kern* agt. *Rackow*, ante, 443.)
3. A defendant cannot move for an order to discharge him from arrest, before he has been actually arrested by the officer. (*Id.*)
4. An order of arrest granted by a justice of the Supreme Court in due form on affidavits, setting forth but slight evidence of the requisite facts, (Code, § 181), and which, on motion to set the order aside, would be insufficient to support it, is nevertheless within the jurisdiction of the judge, and is a pro-

tection to the party obtaining it, as well as to the judge who grants, and officer making arrest under it before it is set aside. Such an order is merely erroneous. (*Hull* agt. *Munger*, 5 *Lansing*, 100.)

5. Where an order of arrest is based on affidavit, in which the statement that the defendant, in removing his property, intends to defraud his creditors, is made upon the deponent's belief, derived from statements made by a certain specified person, and others, the affidavit is legally sufficient to warrant the order, in the first instance. (*Kerr* agt. *Mount*, 28 *N. Y.*, 657, and *Lyon* agt. *Yates*, 52 *Barb.*, 237, explained and distinguished.) (*Id.*)

ASSAULT AND BATTERY.

1. Where, on the trial of an action for assault and battery, the jury, upon the whole charge of the judge, were left to consider a charge of false swearing, made by the defendant, against the plaintiff, at the time of the assault, one of the circumstances to enhance damages; it was held that this was erroneous, and for such error a new trial was granted. (*Pulver* agt. *Harris*, 61 *Barb.*, 78.)
2. In an action, by a female, for assault and battery, where it is alleged, by way of aggravation, that the defendant, being the family physician of the plaintiff, taking advantage of his position, took indecent liberties with her person, and attempted to have sexual intercourse with her; and that by means of the said grievances the plaintiff suffered in body and mind, and was prevented from attending to her ordinary affairs; and the details of the act, as proved, are such as are calculated to aggravate the case, and to call for vindictive damages; the plaintiff's suffering in mind by reason of the shock to her moral sensibilities, is a fair subject of consideration by the jury. (*Ford* agt. *Jones*, 62 *Barb.*, 484.)
3. But the plaintiff's own acts which are not a part of the *res gestæ*—not occurring at the time—are not admissible evidence in proof of the mental suffering. She cannot prove her own acts, at a period of time subsequent to, and somewhat remote from, the time of the alleged injury, for the purpose of establishing such mental suffering. (*Id.*)

See *Green* agt. *Kennedy* (Mem.), 48 *N. Y.*, 653.

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ASSESSMENT AND TAXATION.

1. Since the act of 1851 (Laws of 1851, chap. 176), assessors are not bound by the affidavit presented by an owner of property taxed, upon complaint in relation to the assessment thereof. The affidavit is no longer conclusive, but is evidence to be considered by them, with other means of information in their power, and upon the whole their own judgment is to be formed as to the value of the property. (*The People ex rel. agt. Barker*, 48 N. Y., 70.)
 2. In assessing the real estate of a railroad corporation, assessors are not required to assess it as an isolated piece of land, but each piece of property is to be estimated in connection with its position, its incidents, and the business and profits to be derived therefrom. (*Id.*)
 3. The real estate of railroad corporations, occupied and used by them for railroad purposes, cannot be properly assessed as "non-resident lands." (*Id.*)
 4. The provisions of the Revised Statutes for the assessment of taxes upon incorporated companies (1 R. S., 414, et. seq.) furnish a sufficient basis for the assessment and taxation of the lands of railroad corporations, in those towns and counties remote from its principal place of business. (*Id.*)
 5. The assessors in those towns are not required to make the entries upon their roll required for the purpose of fixing a basis of a tax upon the capital of the corporation. (Snb. 1 and 2, § 6, 1 R. S., 415.) Those directions are appropriate to the assessors of the town or ward where the principal place of business is located, upon whom the duty of assessing the capital is devolved. Where the duty is not devolved the directions are not applicable.
- Held*, also, that within the provisions of the laws for the assessment and collection of taxes, railroad corporations are residents of the towns through which the railroad passes. (*Id.*)
6. A railroad corporation which passes through and occupies land in several counties for the carrying on of its corporate business, is, for the purposes of taxation to be regarded as a resident of each town and county through which it passes. Its real estate is, therefore, properly assessed *in personam* as the land of a resident, and not as non-resident land. (*The B. & S. L. R. R. Co. agt. Supervisors*, 48 N. Y., 93.)
 7. In cases where assessors have jurisdiction they are to decide all questions of law as well as of fact. It is for them to determine, where there are facts calling for the exercise of their judgment, whether land is to be assessed as resident or non-resident land. Whatever may be their decision, they have the immunity of judicial officers. Both they and all persons who act upon their assessment in enforcing the tax are protected, and the tax after it has reached the treasury of the county cannot be collected back. The decision of the assessors cannot be attacked collaterally. (*Id.*)
 8. A flagrant disregard of the facts or assessing in opposition to the clear and undisputed facts, where the application of the statute could not be doubtful, might present a case where the assessors would be without jurisdiction. (*Id.*)
 9. It is not necessary that the affidavits of the assessors attached to the roll should comply literally with the statute. A substantial compliance is sufficient. (*Id.*)
 10. By the statutes of this state, assessors are made the judges of the value of property for the purposes of taxation. They are not bound by proof produced before them, but are required to exercise their own judgment notwithstanding such proof, and the case must be an extraordinary one which will authorize the Supreme Court to review their judgment upon *certiorari*. (*People ex rel. agt. Trustees of Ogdensburgh*, 48 N. Y., 390.)
 11. If, however, the assessors place upon the roll property not liable to taxation, and they refuse upon the application of the person aggrieved to strike it off, their action can be reviewed upon *certiorari*. (*Id.*)
 12. Where, at the time of making out of an assessment roll, the agent of a non-resident has moneys belonging to his principal on deposit in bank, it is liable to be assessed and taxed, although, prior to the time appointed for correction of the roll, it has been withdrawn and used. (*Id.*)
 13. Money due upon a contract for the sale of lands is personal property, and where such a contract belonging to a non-resident is in the hands of an agent who is a resident of an incorporated village, it may, for the purposes

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of municipal taxation, be assessed to the agent and taxed. (*Id.*)

14. The provisions of the act "to subject certain debts due to non-residents to taxation" (chap. 371 of the Laws of 1851), providing that debts due from inhabitants of this state to non-residents for the purchase of real estate shall be assessed in the name of the creditor, and taxed in the town or county the debtor resides, is applicable only to taxation in towns; and as to taxation in villages, the general law authorizing assessment to agents (1 R. S., chap. 13, title 1, § 5, as amended in 1851) remains in force. (*Id.*)

15. By the charter of the village of Ogdensburgh (as amended, chap. 62, Laws of 1865), in making out the assessment roll the trustees are required to follow the town assessment roll, adding thereto property which has been omitted, &c. The town assessors had assessed one P. for \$50,000 of personal property. He appeared before them, and objected to the assessment upon the sole ground that he was a non-resident, and they struck it off. No assessment appeared upon that roll against his agents who had the property under control.

Held, that within the meaning of the charter the personal property was omitted, and was properly added to the village assessment roll and assessed to the agents. (*Id.*)

16. Where lands are taken under a statute authority in derogation of common law right, every requisite of the statute having a semblance of benefit to the owner must be complied with. (*Newell agt. Wheeler*, 48 N. Y., 486.)

17. Under the provisions of the "Act to consolidate the cities of Brooklyn, Williamsburgh," &c., passed in 1854 (chap. 384, Laws of 1854), an assessment for flagging sidewalk must be made against the owner of the premises benefited, unless the land be occupied by another, in which case it may be assessed to the occupant. If assessed to one who is neither owner nor occupant, the assessment is illegal, and a sale of the premises under it void. (*Id.*)

18. The provision of section 10, title 5 of said act, which provides that before issuing a warrant the assessment shall be examined and certified as correct by the street commissioner and attorney and counsel of the city, which certificate shall be conclusive evidence of the regularity of the proceedings, is

only intended to cover the formal proceedings. These officers are not required to go back of the papers and records to ascertain if the persons named are in fact the owners or occupants, and their certificate is not conclusive upon this point. (*Id.*)

19. An action to cancel and annul a certificate of sale upon a void assessment is maintainable, when the defect does not appear upon the face of the proceedings. (*Id.*)

20. Assessors are quasi judicial officers; their assessments are in the nature of judgments. They are not subject to an action to review, modify or reverse their judgments, nor to hold them to personal liability, when acting within their jurisdiction. Their judgments can be reversed by action for fraud, mistake or other cause, giving jurisdiction to courts of equity; but it is the parties affected by the judgment who must be brought into court to litigate, not the judges. (*W. R. R. Co., agt. Nolan*, 48 N. Y., 513.)

21. The authority given to a tax collector by his warrant is special and exceptional, and must be pursued according to its terms. (*First Nat. Bank of Salem agt. Fancher*, 48 N. Y., 524.)

22. Where, upon an assessment roll, there appears an assessment against a stockholder in a bank for the amount of his stock, under the usual warrant attached, directing the collector to collect from the persons named, and to levy the same of their goods and chattels, the collector is not authorized to levy upon and collect the same of the property of the bank, although the bank holds funds with which the tax should have been paid. A contract between the bank and its stockholders cannot thus be enforced. (*Id.*)

23. An assessment upon the shares of a national bank, under the act of 1865 (sec. 10, chap. 97, Laws of 1865), is invalid and cannot be enforced. (*Id.*)

See LEASE. (48 N. Y.)

24. The decision, in due form, of the common council of Rochester, in apportioning the expense of erecting bridges in that city, by assessment upon the tax-payers benefited (Laws, 1861, chap. 143, § 191, &c.), is not questionable by the courts, unless persons who could not be benefited are assessed. (*People ex rel. Butts agt. Com. Council of City of Rochester*, 5 Lansing, 142.)

25. The assessment may be made before

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the title is acquired to the land necessary for the bridge, and notwithstanding section 189 of the charter (*Id.*) prohibits the common council from taking. &c., until damages for the taking are paid. (*Id.*)

26. An assessment founded on proceedings continued at an adjourned meeting of the common council, the adjournment having been made by a minority of the board beyond a single day, but to a day appointed for a regular meeting, is not for that reason void. (*Id.*)

27. Where notice directed attendance at a day and place from seven to nine o'clock, P.M., for the hearing of appeals, and all who appeared were heard, and it did not appear that any one who desired a hearing was prevented by reason of the short time allowed, the proceedings are not void. (*Id.*)

28. Upon *certiorari* against the city to review the proceedings taken in assessing for expense of a bridge, the court will not, as a ground for annulling the assessment, consider the validity of a contract made for building the bridge. (*Id.*)

29. Where the proper assessment has been directed, a clerical error, by which the amount is increased beyond the estimated expense, does not vitiate the assessment. (*Id.*)

30. Section 608 of the charter, which provides that all assessments theretofore or thereafter made for improvements in that city shall be valid and effectual, notwithstanding irregularity, omission or error in the proceedings, is a complete answer to objections such as are above specified. (*Id.*)

See EVIDENCE. (5 *Lansing*.)

MUNICIPAL CORPORATION, (*Id.*)

ASSESSMENTS FOR STREETS, &c.

1. Where the report of commissioners of estimate and assessment was erroneous in not allowing to property owners the value of streets which had been closed and discontinued, and it was referred back to them to correct their report, by an order in which the value was estimated by the court, and the commissioners were ordered to revise and correct their report by allowing certain amounts mentioned in the order;

Held, that such order was erroneous. (*Matter of the Commissioners of Central Park*, 61 *Barb.*, 40.)

2. An order to refer a report back for revision and correction is proper; and such order may be repeated, so long as the commissioners continue to err in the rules by which they are governed; but no authority is given to the court to make such estimate of damages. (*Id.*)

3. When commissioners make a report, which the court holds to be erroneous, and refers it back to them, the commissioners should correct their report on the principles laid down by the court; but the fixing of the valuation of the land is within the peculiar province of the commissioners. (*Id.*)

4. The commissioners should be governed by the law as laid down by the court; and it is not becoming in them to say, in their second report, that, they believe they had adopted the proper rule in the first instance; that the act of making such report is not the result of their deliberation, or judgment, but that they make the same in obedience to the order of the court. Such report should not be received from them. (*Id.*)

5. An act authorizing an assessment for a street improvement is in derogation of individual rights, and must be strictly construed, and rigorously observed. If there is a failure to comply with any material requirement of the act, a sale of property for the payment of the assessment, or a lease based upon such sale, will be invalid to confer either title or right to possession. (*Hopkins v. Mason*, 61 *Barb.*, 469.)

6. The proceedings of the commissioners, in making an assessment, until properly adjudicated, are open to investigation in an action in which the title is involved. In such cases, jurisdiction is acquired step by step, and ceases with any failure to comply with the statute. (*Id.*)

7. A party setting up a title to land under a sale for non-payment of an assessment for street improvements, must show the authority to sell; and that includes the taking of those material steps that must precede a valid sale. (*Id.*)

8. Where, by a statute, the trustees of a village were authorized to appoint three freeholders as commissioners to make assessments for certain street improvements, neither of whom should be owners of, or interested in, property within the assessment district; and the trustees appointed, as one of the commissioners, a person who had an

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actual, pecuniary interest in certain church property situated in the assessment district:

Held, that such commissioner was disqualified to act, and the requirement of the statute was not fulfilled. (*Id.*)

9. The statute also required the commissioners to publish a notice addressed to the owners of land within the assessment district, designating a time and place for receiving proof of certain facts. But the notice published was not addressed to anybody.

Held, this was a failure to comply with a jurisdictional requirement. (*Id.*)

10. The same statute also required the commissioners to publish a notice designating a time and place when and where the parties interested could be heard, and the report seen and inspected; and to return, with their report, any written objections left with them. By the notice which was given, an opportunity was afforded, not for a hearing, but to present written objections; and there was a failure to specify the time and place where such report could be seen and inspected.

Held, that the notice was defective. That the parties interested were entitled to be heard, without presenting written objection. (*Id.*)

ASSESSORS AND ASSESSMENTS.

1. Where assessors assessed the real estate of a corporation at \$125,000, and on application refused to correct the assessment, although the highest valuation fixed for such real estate, by the uncontradicted evidence before them was but \$45,000:

Held, that they should have corrected the assessment, by striking out the sum of \$125,000 as the valuation of the real estate, and inserting the sum of \$45,000 in its place. (*The People ex rel, The American Linen Thread Co. agt. Howland*, 61 Barb., 273.)

2. *Held, also*, that after having deducted from the amount of capital paid in, or secured, such sum of \$45,000, for the value of the real estate, it was proper for the assessors to assess the remaining capital as personal estate, at its actual value, as shown by the evidence before them. (*Id.*)

3. Assessors act in a judicial capacity, in hearing parties aggrieved, and must be governed by the evidence presented to them on an application to correct the assessment. (*Id.*)

4. Where, upon an application to correct an assessment, there is no evidence before the assessors, on the subject of value of the real estate assessed, except the affidavits produced by the owner, they, if uncontradicted, must be considered controlling and conclusive. (*Id.*)

5. The question as to the place of residence of a person owning real estate subject to taxation, is one for adjudication by the assessors, and the duty of deciding it is a judicial duty; and even if they err in the performance of it, ever so clearly and palpably, they are not liable to an action for the redress of the injury thereby occasioned. (*Dorn agt. Backer*, 61 Barb., 597.)

6. Thus, where the largest portion of the plaintiff's farm lay in the town of which the defendants were assessors, and the principal dwelling-house, and other buildings, were on that portion:

Held, that the assessors had jurisdiction of the subject matter, and the question as to whether the farm should be assessed in their town, was one which they were called upon to consider and determine, in the performance of their official duty. And that an action would not lie, against them, to recover back taxes assessed by them upon the farm, although it appeared that at the times when the assessments were made, the plaintiff did, in fact, reside, with a part of his family, in a temporary building erected upon a portion of the farm lying in an adjoining town. (*Id.*)

7. That the duty, and the right, to inquire and decide where the property was liable to be assessed, were necessarily coupled together, and constituted jurisdiction in the matter; and this gave to their decision, if wrong, the character of an error of judgment in a judicial proceeding, for which they were not liable in an action. (*Id.*)

See APPEAL, (61 Barb.,)

CONSTITUTIONAL LAW. (*Id.*)

DEED. (*Id.*)

LEGISLATURE. (*Id.*)

STATUTES. (*Id.*)

DEBTOR AND CREDITOR. (*Id.*)

MUNICIPAL CORPORATION, (5 *Lawing*.)

ASSIGNMENTS.

1. In an assignment of an executory contract for the sale of land, there is no implied covenant on the part of the assignor of title to the land in the vendor; all that that can be implied is a warranty that the assignor owned the

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contract, and had the right to assign it, and that the signatures thereto are genuine. (*Thomas agt. Bastow*, 48 N. Y., 193.)

2. Where the vendor's relation to the title is such that it is possible and feasible for him to perform the contract, and the assignee is placed in such a relation thereto that he can compel performance, the latter cannot repudiate a contract made by him in consideration of the assignments, on the ground of failure of consideration. (*Id.*)

3. The drawing of a draft or check upon a banker holding funds of the drawer does not operate as an assignment of such funds. (*Tyler agt. Gould*, 48 N. Y., 682.)

See BANKS AND BANKING. (48 N. Y.)
CONVERSION. (*Id.*)
PARTNERSHIP. (*Id.*)
STATUTE OF FRAUDS. (*Id.*)

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. An insolvent partnership made an assignment of its property and effects for the benefit of creditors; one of the creditors brought an action in his own behalf, and that of others who should come in and claim the benefit thereof, against the assignees for an accounting and distribution of the trust fund, in which action an order was entered appointing a referee to take and state the account of the assignees, and to report the amount due such creditors as should come in under the order, and seek the benefit of the action, and directing the publication of notices to the creditors to come in and exhibit their demands, which order was complied with, and upon the coming in and confirmation of the report of the referee an order was made for the distribution of the fund, which was fully executed by the assignees.

Held, that, in the absence of fraud, all the creditors of the assignor were bound by the decree, whether they came in and proved their claims or not and that a creditor who failed to do this was barred, although he had no notice of the action, and knew nothing of it until after the distribution of the trust fund; *also held*, that it was not the duty of the assignees, having knowledge of the claim of a creditor who did not appear, to produce and prove such claim before the referee. (*Kerr agt. Blodgett*, 48 N. Y., 62.)

2. An assignee for the benefit of creditors can maintain an action, in his individ-

ual character, to recover a claim due the assignor; he is not required to sue as trustee. (*Hoagland agt. Trask*, 48 N. Y., 686.)

See *Smith agt. Fox* (Mem.), 48 N. Y., 674.

See DEBTOR AND CREDITOR. (61 Barb.)

ASSESSMENT ROLL.

See R. R. MUNICIPAL BONDS. (5 Lansing.)

ASSIGNEE OF MORTGAGE.

See TRUSTS AND TRUSTEES. (5 Lansing.)

ASSIGNOR OF JUDGMENT.

See JUDGMENT DEBTOR, &c. (5 Lansing.)

ATTACHMENT.

1. A justice of the peace has no jurisdiction to issue an attachment under the Revised Statutes (2 R. S., 230, § 26) upon affidavits and papers, unless "it shall satisfactorily appear to the justice that such debtor has departed or is about to depart from the county where he last resided, with intent to defraud his creditors, or to avoid the service of any civil process, or that such debtor keeps himself concealed with the like intent;" (*Garrison agt. Marshall*, ante, 193)
2. Or if the application is intended to be made under § 34 of the non-imprisonment act of 1831, "it must satisfactorily appear before the justice that the defendant is about to remove from the county any of his property with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete any of his property with the like intent, whether such defendant be a resident of the state or not." (*Id.*)
3. In this case, the application for the attachment was made upon the grounds that "the said George Woodruff has departed, and is about to remove his property from the said county of Cayuga with the intent to defraud his creditors."

Held, that the portion of the application stating that the defendant in the attachment had departed, &c., would bring the case under § 26 of the Revised Statutes; while the latter clause presents a case under § 34 of the non-imprisonment act. (*Id.*)

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4. As the application for the attachment was partially made under § 26, it should have been made to appear by the affidavits that the defendant had departed "from the county where he last resided." So also, as it sought to make out a case within the provision of § 34 of the non-imprisonment act, the papers should have shown either that the defendant was a resident of the state, or a non-resident. (*Id.*)
5. These facts were essential to give the justice jurisdiction to issue the attachment, and without one or the other of them, no case was made out within either section of the several statutes quoted. (*Id.*)
6. To bind the property of which manual delivery cannot be made, by the execution and service of an attachment, the notice accompanying the attachment of a levy upon all the property of the defendant, must specify the particular property sought to be reached, of which manual delivery cannot be made. A general notice with the levy of the attachment is insufficient for that purpose. (*O'Brien* agt. *Mech. & Traders Ins. Co.*, ante, 213.)
7. A sheriff having returned a warrant of attachment as "merged in execution," and also having returned the execution, *nulla bona*, is concluded by such return, and has no further rights or powers by virtue of having had the attachment. His powers terminated with the return of the process. An alias execution subsequently issued, could not revive them. (*Clarke* agt. *Goodridge*, ante, 226.)
8. The sheriff served a copy of an attachment on the Bank of the Republic, with a notice showing that he levied on "the bank account of the defendant, Goodridge, and any debt due or owing from the bank to him." At the time of this levy nothing was owing to Goodridge from the bank, and nothing remained to his credit in the bank account; but certain stocks of Goodridge were in pledge to the bank for loans, which stocks at the time were worth no more than the bank had loaned upon them. Subsequently an advance in stocks enabled the bank to sell them, so as to realize a balance which was passed to the credit of Goodridge in the bank account. After such sale no further levy was made by the sheriff, but instead thereof he had returned the process. *Held*, that the debt had not been attached, as it was not in existence at the time of the levy; and as no levy was made after, it was a subsisting debt. (*Id.*)
9. The notice served by the sheriff, was a sufficient compliance with § 235 of the code. Per *DANIELS* and *JAMES, JJ.* (*Id.*)
10. The sufficiency of the notice was not in question in the case. Per *GROVER* and *LORT, JJ.* (*Id.*)
11. The notice was insufficient. *HUNT*, Ch. J. (*Id.*)
12. A receiver in supplementary proceedings in *Clarke's* action, having become vested with all the personal estate of the judgment debtor, including debts owing to him (*Code*, § 298), at a time when no process was in the sheriff's hands, it was *held*, that the receiver was entitled to the property. (*Id.*)
13. The provision in section 241 of the Code, as amended in 1857, that "in all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies," includes all cases; such as a want of jurisdiction in the officer who issued the attachment; fraud in obtaining it; defective papers; and various others. (*Rowles* agt. *Hoar*, 61 *Barb.*, 266.)
14. An application to discharge or vacate an attachment may now be made, in furtherance of justice, upon the real merits of the motion, or for irregularity, or for want of jurisdiction in the officer who granted it, or for any other cause. And such motion may be made after judgment entered, in the action; even though the defendant has appeared and given the undertaking required by sections 240, 241. (*Id.*)
15. In cases where the defendant moves upon his own affidavit, or affidavits made on his behalf, the plaintiff may oppose the motion, as in other cases, by affidavits which either explain or contradict those offered by the moving party. (*Id.*)
16. Where the motion is made on the plaintiff's original affidavits, alone, no further affidavits on the part of the plaintiff are admissible. (*Id.*)
17. When the defendant moves, not only upon the original affidavits used in obtaining the attachment, but also upon his own and other affidavits, in order to show the improvidence of issuing it, as well as to show the injustice of issuing it, on account of the unfair statements in the plaintiff's affidavits, and asks to have it vacated and set aside; to be restored to his rights by reason of the action under it; to set aside the judgment; and to be permitted to come in and defend the action,

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upon the merits, the plaintiff has a right to read affidavits in opposition to each point in his proceedings which is assailed by the defendant in his moving papers, and as to which he asks for relief. (*Id.*)

18. Although an attachment is an extraordinary remedy, not known to the common law, and therefore one which courts should watch with scrupulous jealousy, yet when a creditor fairly brings himself, by his application, within the spirit and intent of the statute authorizing the remedy, he is to be protected in the enjoyment of its advantages. (*Id.*)

See FOREIGN ATTACHMENT. (61 *Barb.*)

19. In cases of non-residents, an attachment issued against property, together with the inventory must be served by leaving copies with the person in possession of the goods. (*Stone* agt. *Milner*, 62 *Barb.*, 430.)

20. And it must appear from the officer's return, that the attachment was served in that manner; otherwise the service will be defective, and the justice will lose his jurisdiction, by reason of such omission. (*Id.*)

21. The levying of an attachment issued against property is a proceeding *in rem*, and it is complete when the levy, and a proper return, are made. (*Id.*)

22. The subsequent proceedings to obtain judgment depend, for their validity, on that of the proceedings under the attachment; and a creditor who, subsequent to the attachment, acquires a lien upon, or interest in, the property has a right to insist that the prior attaching creditor shall show a valid right to appropriate the property. (*Id.*)

23. This the prior creditor can only do by showing his proceedings to be in conformity to the requirements of the statute. If he fails to do this, he cannot hold the property against a subsequent attaching creditor. (*Id.*)

See CONSTABLE. (62 *Barb.*)
UNDERTAKING. (*Id.*)
SURROGATE. (5 *Lansing*)

ATTORNEY.

1. A party has no right, without showing any cause except his own will, to substitute one attorney for another, without the payment of the costs earned. And this rule applies to a board of supervisors. (*Board of Supervisors*, agt. *Brodhead*, ante, 411.)

2. Where a board of supervisors, by their vote, discharge a firm of attorneys who have been acting in their employ (so far as their vote can discharge them) merely because the supervisors choose so to do, with a view to substitute another attorney for the board, they must pay the firm of attorneys their reasonable claims, which may be ascertained by a reference. And the attorneys are not bound to consent to a substitution or to deliver the papers upon which they have a lien, until the amount of their just demands is ascertained by the court or a referee, and paid them. (*Id.*)

3. The proceedings in an action must be taken and conducted in the name of the attorney of record. Before another attorney can act or be heard in the cause he must be regularly substituted of record so as to show his authority. (*Board of Supervisors* agt. *Brodhead*, ante, 426.)

4. A party has no right to interfere with the due and orderly conduct of a suit by his attorney. (*Id.*)

5. Where the defendants in this case procured a settlement, with the design to deprive the plaintiff's attorney of his costs, *held*, that they could not be permitted to have the benefit of a discontinuance or of a supplemental answer showing settlement without payment of the costs of the action up to the present time. (*Dietz* agt. *McCallum*, ante, 493.)

6. An action for assault and battery being at issue and noticed for trial, the parties settled the matter, and the plaintiff executed to the defendant a release and discharge, without consultation with, or notice to, his attorney, to whom he had, in terms, given a lien on the cause of action as security for his costs, advances and counsel fee, of which claim by the plaintiff's attorney the defendant had notice, at the time of the settlement.

Held, that the attorney was not at liberty to proceed in the action, to obtain his costs, advances and counsel fee, after such settlement and release of the cause of action by the plaintiff. (*Pulver* agt. *Harris*, 62 *Barb.*, 500.)

7. *Held*, also, that the release and stipulation executed by the plaintiff bound him to all its terms; and that if he should proceed in violation of it, his proceedings would be set aside as irregular and improper. (*Id.*)

8. *Held*, further, that the action being for assault and battery, the right of action was personal to the plaintiff, and could

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not be assigned. Therefore the assignment of the cause of action to the attorney transferred no interest in the subject matter of the action, and by it he acquired no rights, legal or equitable, against the defendant. (*Id.*)

9. That the case fell directly within the principles laid down in *The People* agt. *Tioga Com. Pleas* (19 Wend., 73), in *Benedict* agt. *Harlow* (5 How., 347), and in *Shank* agt. *Shoemaker* (18 N. Y., 489). (*Id.*)

10. That the cause of action being personal to the plaintiff, the authority to settle the suit before trial, and consequently before the right to costs was determined, rested with him, without any right in his attorney to prevent him from so doing, or to dictate terms. (*Id.*)

11. That after the plaintiff had released and discharged the cause of action, his right of recovery was gone; he had no longer a right to damages; and if not entitled to damages, he had no claim for costs. That the right to costs being dependent on the recovery of damages, if the plaintiff could not have damages, neither could he, or any one claiming through or under him, have costs. (*Id.*)

11. That the attorney had no right to prosecute the action against the wishes and without the authority of his client, on the ground of his being an assignee or "equitable owner" of the cause of action. (*Id.*)

See EVIDENCE. (5 Lansing.)
TITLE TO CHATTEL. (*Id.*)

ATTORNEY-GENERAL.

See PRACTICE. (5 Lansing.)

3. The statute (1 R. S., 532, § 23) which fixes the amount of an auctioneer's compensation for his services, in the absence of agreement in writing, at two and a-half per cent on the amount of sales, refers only to his services as an auctioneer. (*Russell* agt. *Miner*, 5 Lansing, 537.)

4. Held, therefore, that he is entitled to recover disbursements and expenses in excess of the per centage allowed by statute. (*Id.*)

5. And it seems he is entitled to additional compensation for reasonable and extraordinary services, rendered his employers, beyond the mere selling property at public sale to the highest bidder. (*Id.*)

AUCTIONEER.

1. Where an auctioneer states, at the time of sale, "here are 25 barrels of blue vitriol, sound and in good order," it is a warranty to the purchaser that the article is sound and in good order, and that it is blue vitriol. (*Hawkins* agt. *Pemberton*, ante, 102.)

2. And it is error for the court below on the trial to withhold this evidence of warranty from the jury, when properly requested to submit it to them. (*Id.*)

3. The statute fixing the amount of an auctioneer's compensation for his services, in the absence of an agreement in writing, at two and a half per cent on the amount of the sales, refers only to his services as an auctioneer. (*Russell* agt. *Miner*, 61 Barb., 534.)

4. An auctioneer, undertaking to sell goods, is bound to take such proper and necessary steps to insure a successful sale, as are customary and necessary; and if, in performing those incidental duties, any expenses are incurred, such expenses will be properly chargeable against the owner of the property. (*Id.*)

5. In the absence of a written agreement, their compensation for their services as auctioneers cannot exceed two and a half per cent: but what other charges, for disbursements and expenses, they may be entitled to must depend upon what they did beyond the sphere of their duty as mere auctioneers, and upon what, as factors, it was right, reasonable and customary that they should and did do, in respect to the property sold. (*Id.*)

6. The services which an auctioneer, as such, performs, are selling property at public sale, to the highest bidder. All else is beyond his mere calling as auctioneer; and it is only for services as "an auctioneer" that the compensation, fixed by statute, is given. (*Id.*)

AUCTION SALE.

1. An agreement, having the effect to prevent competition at an auction sale of property, is void in law, as against public policy. (*Wheeler* agt. *Wheeler*, 5 Lansing, 355.)

2. No subsequent acts of the parties under such a contract will have the effect of ratifying or confirming it, or estop the parties from asserting its invalidity. (*Id.*)

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3. Accordingly, where plaintiff and defendant agreed in writing that on a partition sale of certain real estate, of three sevenths of which the defendant was the owner as trustee for infants, the defendant would not bid, and that if the plaintiff should become the purchaser, plaintiff should pay four sevenths and defendant three sevenths of the purchase-money, and that the property should be divided between them by a line agreed upon:

Held, in an action of ejectment, brought to recover from defendant the piece to which he became entitled under such agreement, he being in possession thereof, the plaintiff having purchased at the sale, and taken a conveyance, that such agreement being void as against public policy, plaintiff was not estopped from claiming that the contract was illegal, although he had received from the defendant his share of the purchase price, or a portion thereof, and had made no offer to refund it, and that, being the legal owner of the premises, he could recover the portion claimed by him. (*Id.*)

See CHATTEL MORTGAGE. (48 N. Y.)

AUTHORITY.

See JUSTICE OF THE PEACE. (5 Lansing.)

B.

BAIL.

1. In an action for the recovery of possession of personal property, the defendant was arrested under the provisions of subdivision 3 of section 179 of the Code, and, upon giving the undertaking required by section 187, in such cases, was released from arrest by the sheriff, who thereupon returned the order of arrest to plaintiff's attorney. Plaintiff excepted to the bail; they failed to justify, but prior to the expiration of the time for justification, surrendered the defendant to the sheriff, in whose custody he remained. Plaintiff subsequently recovered judgment for the delivery of the property, or payment of its value, with costs.

Held, that the surrender by bail was unauthorized, and did not exonerate them, and that, under section 201 of the Code, the sheriff was liable as bail; which liability was not satisfied by having the defendant within his custody, amenable to process, but that, as far as the plaintiff was concerned, he stood in the

place of the bail in the undertaking given to him, and the extent of his liability was measured by theirs. (*McKenzie agt. Smith*, 48 N. Y., 143.)

2. Defendant was the nominal owner of a steam-tug. A., the real owner managed her as master, exercised entire control over her, and received all her earnings. She was libeled in the District Court of the United States, and seized at Buffalo, for a penalty incurred by carrying passengers without a license. A. procured plaintiff to become bail for her discharge. A decree was rendered for the penalty, and plaintiff became bail upon an appeal bond, conditioned that defendant should pay "all such costs and expenses" as should be awarded against him. The decree was affirmed and plaintiff paid the amount of the execution thereon. All this was without communication or consultation with defendant, who resided in the city of New York. Plaintiff brought this action to recover back the money paid, basing it upon the appeal bond.

Held, 1st, that plaintiff made the payment, not as surety upon the appeal bond, but as defendant in the decree, which was *in personam* against him as surety upon the first bond; also; that as the appeal bond was not conditioned to pay damages there could be no recovery for the amount of the decree; 2d, that as the vessel was in a home port, and defendant near enough to be consulted, there being no pressing emergency, the master could not bind him. (*Gager agt. Babcock*, 48 N. Y., 154.)

BAILMENTS.

1. A bailee of property, to which there are adverse claimants, has the right to refuse to deliver the same for such reasonable time as will enable him in good faith to investigate the facts as to the real ownership thereof. But after such time has elapsed, and after the owner has offered to give a bond of indemnity satisfactory to the bailee, a refusal to deliver the property is a conversion. (*Ball agt. Liney*, 48 N. Y., 6.)
2. If such bailee desires to relieve himself from the embarrassment of conflicting claims, and from the responsibility of deciding between them, he can do so by commencing a suit in the nature of a bill of interpleader against the different claimants, and thus have their rights to the property judicially determined. (*Id.*)

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3. Defendant had in his possession as bailee certain property belonging to plaintiff, which he refused to deliver up on demand. Subsequent to such refusal the property was seized and sold by virtue of an execution against one G., and the proceeds applied in satisfaction thereof. The sheriff, at the same time, had in his hands an execution against plaintiff, but nothing was done by virtue thereof. In an action for the conversion:

Held, that the fact that such execution was in the hands of the sheriff was not proper to be considered in mitigation of damages. (*Id.*)

4. The proposition that a bailee cannot deny the title of his bailor, does not apply to a case where the bailee has been compelled by action, of which the bailor had notice, to pay for the property to one having the true title. (*Cook* agt. *Holt*, 48 N. Y., 275.)

See FRAUDS, STATUTE OF. (5 *Lansing*.)

BANKRUPTCY.

1. That where a partnership is in bankruptcy, and the separate estate of one partner is more than enough to pay his separate debts, at the amounts proved as they stood at the time of the adjudication, without computing interest thereon after that time, the surplus of such estate, over such debts, is to be added to the partnership estate, and applied to the payment of the joint debts, before paying such interest on the separate debts. (*In the matter of Berrian*, ante, 216.)

2. The provisions of § 33 of the bankruptcy act as amended July 14, 1871, providing for the discharge of the bankrupt from all debts contracted prior to the first day of January, 1869, construed. (*In the matter of Swift*, ante, 247.)

3. A tenant on the 1st day of May, 1868, surrendered his lease, which had another year to run, under a bargain that the landlord should rent the premises for the remainder of the term for what he might be able to get for them, and apply the rent to the credit of the tenant, and that the tenant should pay to the landlord such sum as the rent so received by him subsequent to such surrender should fall short of the rent reserved in the lease so surrendered with interest on quarterly deficits from the close of each quarter respectively. (*Id.*)

4. At the end of the year a considerable amount having so become due, the landlord recovered a judgment therefor. After the recovery of this judgment, the bankrupt filed his petition in bankruptcy.

Held, that the claim was contracted prior to January 1st, 1869, to wit: on the day of surrendering the lease and entering into the contract to pay the deficiency of rent. (*Id.*)

5. In order to charge the creditors of a bankrupt with the amount of a debt collected by them out of his property, in fraud of the bankrupt act, by means of a judgment confessed by him, it is necessary to show that such creditor's knowledge that the debtor was acting in view of insolvency, and with intent to give them a preference. (*Hoover* agt. *Greenbaum*, 62 Barb., 188.)

6. Facts obtained by the attorneys of the creditors, in the prosecution of a suit against the debtor, are not sufficient to charge the creditors with such knowledge; where it does not appear that the creditors knew of the commencement of such suit, and there was no communication of the facts obtained by the attorneys to the creditors. (*Id.*)

7. The mere non-payment, by the debtor, of the claim against him, and the collection thereof upon a judgment, is not sufficient to charge the creditors with the knowledge required by the bankrupt act. (*Id.*)

BANKS AND BANKING

1. The cashier of a bank is bound to exercise reasonable skill and ordinary care and diligence in the performance of his duties. If he fails in such skill or omits such care and diligence, and the bank suffers damage in consequence, he is liable. (*Commercial Bank* agt. *Ten Eyck*, 48 N. Y., 305.)

2. In the absence of fraud or collusion, he is not liable to the bank for an act done under the direction of its president, the managing officer, under circumstances which do not disclose any absence of due care and diligence upon his part. (*Id.*)

3. The provisions of section 8 of the act in relation to moneyed corporations (1 R. S., 591), which provide that no conveyance, &c., of the real estate and effects of such corporation, exceeding \$1,000 in value, shall be made, unauthorized by a previous resolution of the board of directors, do not apply to a sale, by the financial officers of a bank

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- of mortgages or other securities pledged to secure a loan, made to realize the money secured by the pledge. (*Id.*)
4. Where the transaction is in reality a loan upon sufficient security, if loss is sustained, a cashier is not liable for permitting it to be done in the form of an overdraft. (*Id.*)
5. A cashier forwarded certain securities, belonging to his bank, to responsible brokers for sale, drawing against them for a portion of their value, which draft was accepted and paid. He negligently omitted to inquire after the securities or to collect the balance realized on sale thereof. The brokers with knowledge that the bank had an interest therein, wrongfully applied such balance upon a claim against a third person. In an action against the cashier (the brokers remaining responsible):
- Held* that, as the brokers were liable to the bank for the balance, it sustained no damage from the cashier's negligence, and he, therefore, was not liable. (*Id.*)
6. A certificate of deposit issued by a bank is not a contract but an evidence of debt; it is in the nature of a receipt, and parol evidence is admissible to explain it, the same as in case of a receipt. (*Hotchkiss* agt. *Mosher*, 48 N. Y., 478.)
7. Plaintiffs paid to the defendants, who were bankers, the amount of certain notes held by them, which were guaranteed by him, for the purpose of taking up the same; the notes, being made payable at defendants' bank, were left with them for collection. As a voucher of the transaction, defendants delivered to plaintiff a certificate of deposit for the amount paid for the notes. In an action of trover for the conversion of the notes:
- Held*, that the referee was justified in finding that the certificate was a voucher that plaintiff had paid the money for the notes, thus giving it the character and effect ascribed to it by defendants. He was also justified in refusing to find that the money paid was a deposit. (*Id.*)
8. The naming of a bank in a promissory note as the place of payment, does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority, or duty is thereby conferred upon it in reference to the note. (*Hills* agt. *Place*, 48 N. Y., 520.)
9. Where, upon an assessment roll, there appears an assessment against a stockholder in a bank for the amount of his stock, under the usual warrant attached, directing the collector to collect from the persons named, and to levy the same of their goods and chattels, the collector is not authorized to levy upon and collect the same of the property of the bank, although the bank holds funds with which the tax should have been paid. A contract between the bank and its stockholders cannot be enforced. (*First Nat. Bank of Salem* agt. *Fancher*, 48 N. Y., 524.)
10. The legal title to the stock of a bank passes by an assignment and delivery of the certificate therefor, although there be no transfer upon the books of the bank. (*Leitch* agt. *Wells*, 48 N. Y., 585.)
11. The drawing of a draft or check upon a banker holding funds of the drawer does not operate as an assignment of such funds. (*Tyler* agt. *Gould*, 48 N. Y., 682.)
- See CONSIGNOR AND CONSIGNEE. (48 N. Y.)
EXECUTORS AND ADMINISTRATORS. (*Id.*)
PAYMENT. (*Id.*)
- BEQUEST.
- See DEVISE. (5 *Lansing*.)
- BILLS OF EXCHANGE & PROMISSORY NOTES.
1. An action was brought in this case by the assignee upon a paper, of which a copy is as follows: "Rochester, February 28, 1861, Please pay to Jacob Hinds or order, \$100, from the proceeds of Leonard & Ives' bond, and charge the same to the account of, yours, &c., ADIN J. HINDS. To CHAS. H. STEWART, Esq., Counsellor, &c., New York." "Accepted, payable as soon as this amount is collected, accruing to drawer. CHAS. H. STEWART." Indorsed upon its face, "JACOB HINDS."
- Held*, that this paper was not a draft, nor was it negotiable. No title to it, or any indebtedness for which it may have been given, passed to the assignee by the mere indorsement of it. By its express terms it was made payable from an anticipated, specific fund, not then in existence, and its future existence contingent. (*Kenny* agt. *Hinds*, ante, 7.)
2. As the indorsement to the plaintiff was

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all which he showed as proof of his ownership of it, and of any claim against the defendant, he failed to make out a case. (*Id.*)

3. The defendant, a farmer, at the request of one M., accepted the agency for the sale of a patent hay-fork. M. produced and signed a paper in duplicate purporting to state defendant's agency, and also a paper printed therewith, and attached thereto, purporting to be an order for forks. Defendant, relying on M.'s statement, signed the part and counterpart. M. left with defendant the counterpart with both their signatures. (*Chapman agt. Rose, ante, 364*)

4. The plaintiff, a broker, became holder of a part of one of the instruments which M. took away, and which turned out to be, not an order for forks, but a promissory note for \$270, purporting to have defendant's signature. The note was payable to M. or bearer, indorsed by him, and before maturity sold to plaintiff for \$25 less than its face. Defendant conceded that the signature looked like his, but denied that he ever made the note, and the plaintiff brought a suit upon it.

Held, a very clear case of fraudulent practice is made out on the facts against M., whereby the defendant's signature was obtained to a paper of a character which he did not intend to sign. Where the party sought to be charged by his signature shows that he never intended to put his name to any such instrument, that he was deceived as to its actual contents, and that he is not chargeable with laches, negligence or misplaced confidence, which is negligence; he will not be held liable, even to a *bona fide* holder, before maturity. There is no contract where there is no assent. Judgment for defendant. (*Id.*)

5. The naming of a bank in a promissory note as the place of payment, does not make the bank association an agent for the collection of the note or the receipt of the money. No power, authority or duty is thereby conferred upon it in reference to the note. (*Hills agt. Place, 48 N. Y., 520.*)

6. No presentment at the place named is necessary to give a right of recovery against the maker. It only relieves him from damages if he was ready at the time and place named to pay it, and there was no one to receive it. Such readiness is equivalent to a tender, and an answer pleading that fact, and payment of the money then due into court, will be a bar to the recovery of inter-

est and costs, but not to the cause of action. (*Id.*)

7. Where, therefore, the maker has put funds in the bank sufficient to pay the note when due, and has given instructions to pay upon presentation, but, the note not having been presented at maturity, has thereafter withdrawn the funds and has not brought the money into court, the owner of the note is entitled to judgment thereon for both principal and interest. (*Id.*)

8. Where, in a copartnership agreement between A. and B., no firm name is expressly adopted, but A. is to give his personal attention to, and have entire control and management of the business, with authority to arrange and negotiate the acceptance of drafts, B. to incur no risks and to assume no responsibility, it is a fair inference that the copartnership business is to be done in the name of A., and B. is liable upon a draft drawn by A. in his individual name, procured to be discounted by him for the benefit of the firm, and avails applied to its use, although at the time the draft was discounted B. was not known to the payee as a partner. (*GRAY C., dissenting.*) (*Ontario Bank agt. Hennessey, 48 N. Y., 543.*)

9. The drawing of a draft or check upon a banker holding funds of the drawer does not operate as an assignment of such funds. (*Tyler agt. Gould, 48 N. Y., 682.*)

See BANKS AND BANKING. (*48 N. Y.*)
CAUSE OF ACTION. (*Id.*)
CONSIGNOR AND CONSIGNEE. (*Id.*)
FORMER ADJUDICATION. (*Id.*)
PARTNERSHIP. (*Id.*)
Douglass agt. Dudley, (Mem.), 48 N. Y., 688.

10. When a draft is an accommodation one—that is, lent without consideration—it has no validity till it reaches the hands of a *bona fide* holder for value; and if the first transfer of it be tainted with usury, the paper will be void in the hands of any subsequent holder. (*Howe agt. Potter, 61 Barb., 356.*)

11. But these rules have no application to a case where there was a consideration for the draft sued on, when it was first issued, and the transaction was not one which made the transfer to the plaintiff a usurious one. (*Id.*)

12. Where, in an action upon a draft, the defendant claim that there was a misrepresentation as to the value of the property forming the consideration, and that therefore they offered to

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return it, and demanded back the draft, that does not make out a case of a draft given without any consideration, as a mere accommodation. On the contrary, it shows there was some consideration; and when that is so, a *bona fide* purchaser, no matter what sum he gives for it, may recover. (*Id.*)

13. The acceptance, whether general, or for honor, or *supra* protest, after sight, of a bill of exchange, admits the genuineness of the signature of the drawer, and consequently, in favor of a *bona fide* holder for value without notice, if the signature of the drawer turns out to be a forgery, the acceptance will nevertheless be binding, and entitle such holder to recover thereon according to its tenor. (*The Salt Springs Bank* agt. *The Syracuse Savings Institution*, 62 Barb., 101.)

14. If the drawee of a forged bill has paid it, he cannot recover back the money, although the forgery is conclusively established. Having by that act admitted its genuineness, he will not be permitted to dispute it, afterwards, although he can have no recourse against the drawer, for reimbursement. (*Id.*)

15. Thus, where a forged check upon the plaintiff's bank was received by the defendant in the course of its business, in good faith, it having paid the full amount named therein, without notice of the forgery, and the plaintiff, on presentment of such check, by the defendant, received and paid it:

Held, that these facts brought the case within the above rules; and that the plaintiff could not recover back from the defendant the sum paid upon the check. (*Id.*)

16. *Held*, also, that the fact that the forged check had upon its face the forged signature of the plaintiff's teller, which was overlooked, at the time of presentment, together with the facts that the pretended drawer was not even a customer of the bank, and had no account there out of which the check could be paid, demonstrated what would otherwise have been matter of inference merely, viz., that the plaintiff's agents were guilty of very great neglect. (*Id.*)

BILL OF LADING.

See CONSIGNOR AND CONSIGNEE. (48 N. Y.)
CARRIER. (5 Lansing.)

BONA FIDE HOLDER.

See BILLS OF EXCHANGE. (61 Barb.)
CORPORATION. (5 Lansing.)

BONDS.

See SHIPPING. (48 N. Y.)
W. & O. Col. Institute agt. *Blackmar* (Mem.). (48 N. Y., 663.)
Schott agt. *Schwartz* (Mem.). (48 N. Y., 666.)
OBLIGATION. (61 Barb.)

1. Taking a bond of indemnity, by overseers of the poor, against the expenses of supporting a poor person is not a violation of the statute which prohibits a sheriff or any other officer from taking any bond or other security, by color of his office, in any other case or manner than such as are provided by law. (2 R. S. 286, § 60.) (*Turner* agt. *Hadden*, 62 Barb., 480.)

2. Such a bond, unless it be taken by the obligees wrongfully, under the pretended authority of their office, and grounded upon corruption to which the office is a mere shadow of color, is valid. (*Id.*)

3. An action upon a bond given to overseers of the poor, to defray the necessary expenses of supporting a poor person, and a recovery therein, for the expenses of supporting the person named, up to a certain period, is no bar to a second action, to recover for subsequent support, where it appears that in the first action damages for an entire breach were not recovered. PARKER, J., dissented. (*Id.*)

4. In an action upon a bond of indemnity against support, funeral expenses cannot be recovered. (*Id.*)

See GIFT. (62 Barb.)
DAMAGES. (5 Lansing.)
FORGERY. (*Id.*)
PUBLIC OFFICER. (*Id.*)
RAILROAD MUNICIPAL BONDS. (*Id.*)
TITLE TO CHATTELS. (*Id.*)

BONDING TOWNS.

See TOWNS. (62 Barb.)
RAILROAD MUNICIPAL BONDS. (5 Lansing)

BOUNTIES.

1. The town of W. voted a bounty to each individual who should volunteer and be credited upon its quota under a call of the president. Prior to the town meeting when the bounty was

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voted, McM. had enlisted and been mustered in as a substitute for defendant, but the latter had paid him nothing. K. paid McM. the amount of the town and county bounties, and took from him an assignment of his claim therefor. Defendant assented to K.'s right to receive them. Subsequently defendant demanded and received of the supervisor of W. the bonds of the town for the amount of the bounty to McM. In an action by an assignee of K. for an alleged conversion of the bonds.

Held, 1st, that the ratification and acceptance by the town of the credit given it by McM.'s enlistment was a sufficient consideration for its promise to pay the bounty, and he and his assigns became thereby legally entitled to the bonds issued therefor. 2d. Defendant having received them without claim of right was liable to an action for their conversion. (*Carver* agt. *Creque*, 48 N. Y., 385.)

2. The control conferred upon congress, by the constitution of the United States (art. 1, § 8), over the state militia, begins when they are mustered into the service of the United States. Arrangements by the states to procure or aid in calling them forth are not unauthorized, nor are regulations, fixing and limiting the amount of bounties, or rewards given to procure their services; therefore, section 4, of chapter 29, of the Laws of 1865, which prohibits the payment of any sums for the procurement of volunteers, save as provided for by that act, is not in conflict with the constitution of the United States, and an agreement to pay a sum prohibited by that section is void. (*Powers* agt. *Shaward*, 48 N. Y., 540.)

BOUNTY MONEYS.

See ACTION. (5 *Lansing*.)

BREACH OF CONDITION.

See LEASE. (5 *Lansing*.)

BREACH OF THE PEACE.

See ARREST. (5 *Lansing*.)

BREACH OF WARRANTY.

See COVENANT OF WARRANTY. (5 *Lansing*.)
EVIDENCE. (*Id.*)

BRIBERY.

See RAILROAD MUNICIPAL BONDS. (5 *Lansing*.)

BRIDGES.

See ACTION. (62 *Barb*.)

1. The law imposes an obligation upon two towns, separated from each other by a creek, to build a bridge across such creek at their joint expense only in cases where the bridge connects two highways lying in the towns respectively. (*Beckwith* agt. *Whalen*, 5 *Lansing*, 376.)

2. Accordingly, where it appeared, by the opening of plaintiffs' counsel in a suit brought by the highway commissioner of the town of P. for contribution to the expense of building a bridge across a creek separating the two towns, which bridge had been built by plaintiffs after due notice to defendant to unite in building the same and refusal, pursuant to chap. 225 of 1847, as amended by chap. 383 of 1857, merely that a highway in P. connected with the highway in K. by such bridge had been laid out, but had, in part, not been worked as such for twelve years, though a part of it, not designated, had been worked within six years, it was *held*, that the highway last mentioned must be deemed to have been abandoned; and that as no liability appeared from these facts on the part of the town of P. to contribute to such bridge, a non-suit was properly granted at the close of such opening. (*Id.*)

3 The Statute, chap. 639 of 1857 does not, it seems, repeal chap. 225 of 1841 as amended by chap. 383 of 1857, and is not wholly inconsistent with it. It provides simply for another and different mode of procedure in the erection of a bridge between two towns, but does not, in terms or by necessary implication, make it the exclusive mode of procedure. (Per JOHNSON, J.) (*Id.*)

See ASSESSMENT. (5 *Lansing*.)
CANAL CONTRACTOR. (*Id.*)

BROKER.

See Douglas agt. *Dudley*, (Mem.), 48 N. Y., 688.

BROKER'S COMMISSIONS.

1. In an action to recover *Brokers commission* on a sale of real estate, upon the trial before the court and a jury,

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evidence was introduced by both parties, and at the close of such evidence, defendant's council moved to dismiss the complaint on the ground that a broker cannot take a commission from both parties, the motion was denied, and the defendant excepted. (*Rowe* agt. *Stevens*, ante, 10)

2. The court, in submitting the case to the jury, charged that, under certain circumstances stated, a broker could take a commission from both parties, and left it to the jury to say whether this was such a case—the defendant did not except to the charge of the judge nor to any insufficiency of evidence. *Held*, that the defendant was concluded by the verdict of the jury against him. Not having excepted to the judge's charge nor to the insufficiency of evidence, he could not move for a new trial on the judge's minutes. (*Id*)

3. Where a broker, employed to sell real estate, procures a party willing to purchase on the owner's terms, and the owner refuses to convey to the party so procured, the law will *presume* in the absence of evidence to the contrary, that the person so procured was *solvent* and pecuniarily able to perform the contract he offered to make. Solvency, not insolvency, is presumed in the absence of proof on the subject. (*Hart* agt. *Hoffman*, ante, 168.)

BROOKLYN, CITY OF.

See STATUTES. (48 N. Y.)

BUFFALO, CITY OF.

See SUPERIOR COURT OF CITY OF BUFFALO. (48 N. Y.)

BURDEN OF PROOF.

See MUNICIPAL CORPORATION. (5 *Lansing*.)

BURGLARY.

See CRIMINAL LAW. (5 *Lansing*.)

C.

CANAL BASIN.

See PRESCRIPTION. (5 *Lansing*.)

CANAL BOARD.

See CANAL CONTRACTOR. (5 *Lansing*.)
PRESCRIPTION. (*Id*.)

CANAL BRIDGES.

See CANAL CONTRACTOR. (5 *Lansing*.)

CANAL COMMISSIONER.

See PRESCRIPTION. (5 *Lansing*.)

CANAL CONTRACT.

See CANAL CONTRACTOR. (5 *Lansing*.)

CANAL CONTRACTOR.

1. The liability of a canal contractor for negligence in repairing a bridge, *held*, not to be affected by the appointment of the canal board of a superintendent for the same section, who gave directions for repairs to the same bridge, which were followed by the contractor. (*French* agt. *Donaldson*, 5 *Lansing*, 293.)

2. Nor because his contract was to be performed as required by the canal commissioners. (*Id*)

3. Bridges erected over the canals, in continuation of streets and highways, *held* to be within the provisions of the contract for repairs. (*Id*.)

4. The provisions of the act of 1857 (ch. 105, § 1, &c.) placed canal contractors in the position formerly occupied by the superintendents of repairs, and imposed upon them the same liability. (*Conroy* agt. *Gale*, 5 *Lansing*, 344.)

5. Repairs of canal bridges are placed, by the act of 1867 (ch. 577, § 3,) in the same category with other repairs; and the liability of the contractor to individuals, for neglect to keep them in repair, became the same in either case. (*Id*.)

CANAL REPAIRS.

See CANAL CONTRACTOR. (5 *Lansing*.)

CANALS.

See CRIMINAL LAW. (61 *Barb*.)

1. The towing-path on our canals, being a public highway for all boat men using the canals, the right of a boatman to travel with his team thereon, is at least equal to that of a traveler upon a public highway. And in cases of damages sustained by him while so traveling, through the negligence of others, the same rule is applicable which governs in respect to acts done upon a public highway, which render traveling there unsafe. *Conklin* agt. *The*

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Phoenix Mills of Seneca Falls, 62 Barb. 299.)

2. And in reference to highways, the general doctrine is, that any act of an individual, done to a highway, though performed on his own soil, if it detracts from the safety of travelers, is a nuisance. (*Id.*)

3. In those cases where the acts done are not deemed in law to be nuisances, no action will lie, by the party injured, unless there is an abuse of the right, or some irregularity in the manner of exercising it. (*Id.*)

See NEGLIGENCE. (62 Barb.)

PREScription. (5 Lansing.)

CANAL SUPERINTENDENT.

See CANAL CONTRACTOR. (5 Lansing.)

CASES REVERSED. OVERRULED. QUESTIONED, CRITICISED OR EXPLAINED.

1. *Ball* agt. *Liney* (44 Barb., 505), reversed. (*Ball* agt. *Liney*, 48 N. Y., 6.)
2. *Green* agt. *Putnam* (1 Barb., 500), distinguished. (*Scott et al.* agt. *Guernsey et al.*, 48 N. Y., 123.)
3. *Walden* agt. *Darison* (15 Wend., 575), explained. (*James* agt. *Gurley*, 48 N. Y., 166.)
4. *Booth* agt. *Bunce* (24 N. Y., 502), distinguished. (*Smith* agt. *Van Olinda*, 48 N. Y., 171.)
5. *Kellogg* agt. *Richards* (14 Wend., 116), distinguished and explained. (*Ryan* agt. *Ward, et al.*, 48 N. Y., 207.)
6. *Jackson* agt. *Matsdorf* (11 John., 91), explained. (*Everett* agt. *Everett*, 48 N. Y., 223.)
7. *Ring* agt. *Whitely* (10 Paige, 464), explained. (*Thorp* agt. *Kockuk Coal Co.*, 48 N. Y., 257.)
8. *Livingston* agt. *Livingston* (4 John. Ch., 294), distinguished. (*Central Bank, Troy*, agt. *Heydorn*, 48 N. Y., 265.)
9. *Potter* agt. *Cromwell* (40 N. Y., 287), explained and criticised. (*Voorhees et al.*, agt. *McGinnis et al.*, 48 N. Y., 282.)
10. *Ferris* agt. *Kilmer* (47 Barb., 411), reversed. (*Ferris* agt. *Kilmer*, 48 N. Y., 301.)
11. *Happy* agt. *Mosher* (47 Barb., 501), reversed. (*Happy* agt. *Mosher*, 48 N. Y., 313.)
12. *Dole* agt. *Bull* (2 John. Cases, 239) explained. (*Richardson* agt. *Crandall*, 48 N. Y., 359.)
13. *Patrick* agt. *Metcalf* (37 N. Y., 232), and *Butterworth* agt. *Gould* (41 Id., 450), distinguished. (*Carver* agt. *Creeque*, 48 N. Y., 389.)
14. *Chapman* agt. *City of Brooklyn* (40 N. Y., 372), explained. (*Newell* agt. *Wheeler*, 48 N. Y., 490.)
15. *Murray* agt. *Burling* (10 John., 172), distinguished. (*Salt Springs Nat Bank* agt. *Wheelen*, 48 N. Y., 497.)
16. *City of Utica* agt. *Churchill* (33 N. Y., 161), overruled. (*First Nat Bank of Sandy Hill* agt. *Funcher*, 48 N. Y., 524.)
17. *Jacques* agt. *Marquand* (5 Cor., 497), and *Tullmudge* agt. *Penoyer* (35 Barb., 120), distinguished and explained. (*Ontario Bank* agt. *Hennessey*, 48 N. Y., 551.)
18. *Keenholls* agt. *Becker* (3 Denio, 346), questioned. (*Bassell* agt. *Elmore*, 48 N. Y., 567.)
19. *Seymour* agt. *Wilson* (14 N. Y., 567), and *Cortland* agt. *Herkimer* (44 Id., 22), distinguished. (*Waugh* agt. *Fielding, et al.*, 48 N. Y., 681.)
20. The case of *Red* agt. *Randall*. (29 N. Y., 358,) distinguished. (*Wells* agt. *Schood*, 61 Barb., 238.)
21. The case of *Bret* agt. *Rucknam*, (32 Barb., 655) commented on, and questioned. (*Hauseman* agt. *Sterling*, 61 Barb., 347.)
22. The case of *Mills* agt. *The City of Brooklyn*. (32 N. Y., 480,) commented on, and distinguished. (*Leventhal* agt. *The Mayor, &c. of New York*, 61 Barb. 511.)
23. The cases of *Alden* agt. *Clarke*, (11 How. Pr. 209.) and *Frink* agt. *Morrison* (13 Abb. 80,) approved, and *Wilgus* agt. *Bloodgood*, (33 How., 289,) and *Flanagan* agt. *Twin*, (53 Barb., 587,) disapproved. *The Marine Bank of Chicago* agt. *Van Brunt*, 61 Barb. 361.)
24. The decision in *Dawson* agt. *Horan* (51 Barb. 459), approved and followed; and the case of *The People* agt. *Toynbee*. (13 N. Y., 378), commented on and distinguished. (*Knight* agt. *Campbell*, 62 Barb., 16.)
25. The case of *Van Slyke* agt. *Shelden* (9 Barb., 278) distinguished from the present. (*Mowry* agt. *Sanborn*, 62 Barb., 223.)

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26. The decision in *Dunlop* agt. *Patterson* (5 *Coven*, 243,) questioned and declared to be at best, ambiguous; and, although qualified by *The People* agt. *Evans*, (40 *N. Y.*, 5, 6,) the authority of the latter case held to have been entirely destroyed by the case of *Dunn* agt. *The People* (29 *N. Y.* 526, 528.) (*Warren* agt. *Haight*, 62 *Barb.*, 490.)
 27. The decision in *Donovan* agt. *Wilson*, 26 *Barb.* 138,) approved and followed. (*Ferren* agt. *O'Hara*, 62 *Barb.*, 517.)
 28. *Adsit* agt. *Brady* (4 *Hill*, 630), followed and extended. (*Conroy* agt. *Gale*, 5 *Lansing*, 344.)
 29. *Bagley* agt. *Smith* (10 *N. Y.*, 489), considered and distinguished. (*Van Ness* agt. *Fisher*, 5 *Lansing*, 236.)
 30. *Bissell* agt. *Pearce* (28 *N. Y.*, 252), distinguished. (*Scott* agt. *Delahunt*, 5 *Lansing*, 372.)
 31. *Clafin* agt. *Farmers' and Citizens' Bank* (25 *N. Y.*, 293), distinguished. (*Titus* agt. *President, &c., of Great Western Turnpike Road*, 5 *Lansing*, 250.)
 32. *Hogan* agt. *Cregan* (6 *Robt.*, 141), disapproved. (*Damon* agt. *Moore*, 4 *Lansing*, 454.)
 33. *Jackson* agt. *Ellsworth*, (20 *Johns.*, 180), considered. (*Allen* agt. *Brown*, 5 *Lansing*, 280.)
 34. *Jenkins* agt. *Waldron* (11 *Johns.*, 114), followed. (*Goetcheus* agt. *Mathewson*, 5 *Lansing*, 214.)
 35. *Kerr* agt. *Mount* (28 *N. Y.*, 657), explained and distinguished. (*Hall* agt. *Munger*, 5 *Lansing*, 100.)
 36. *Lyon* agt. *Yates* (52 *Barb.*, 537), explained and distinguished. (*Hall* agt. *Munger*, 5 *Lansing*, 100.)
 37. *People* agt. *Miner* (2 *Lans.*, 396), reaffirmed. (*People* agt. *Albany and Susquehanna R. R. Co.*, 5 *Lansing*, 25.)
 38. *People* agt. *O'Brien* (38 *N. Y.*, 193), considered. (*Healey* agt. *Dudley*, 5 *Lansing*, 115.)
- premises containing a clause that it was made subject to a mortgage which the grantee thereby assumed and agreed to pay. The bonds accompanying the mortgage contained a condition that, in case of default recourse must first be had to the lands mortgaged, and that the obligors would only be answerable for the deficiency. Held, that the mortgagee could maintain an action upon the implied covenant in defendant's deed, without first foreclosing the mortgage, and could recover the whole amount unpaid. (*Id.*)
3. A judgment creditor has a mere general, not a specific lien upon the debtor's real estate; he cannot therefore maintain an action for waste committed thereon. (*Lanning* agt. *Carpenter*, 48 *N. Y.*, 408.)
 4. If A. has agreed to sell property to B., C. may, at any time before the title has passed, induce A. to sell it to him instead, and, if not guilty of fraud or misrepresentation, he does not incur any liability, and this is so, although C. may have contracted to purchase the property of B. B. cannot maintain an action upon the latter contract, as he cannot perform, and can only look to A. for a breach of the former. (*Ashley* agt. *Dixon*, 48 *N. Y.*, 430.)
 5. An action to cancel and annul a certificate of sale upon a void assessment is maintainable, when the defect does not appear upon the face of the proceedings. (*Newell* agt. *Wheeler*, 48 *N. Y.*, 486.)
 6. An announcement made upon an auction sale of personal property, that it is sold subject to a chattel mortgage and that the purchaser will have to comply with the conditions thereof, does not impose a personal obligation upon a purchaser who hears and assents to the announcement, and an action cannot be maintained against him to recover the amount secured by the mortgage. (*Hamill* agt. *Gillespie*, 48 *N. Y.*, 556.)
 7. Where A. loans his note to B., upon the strength of C.'s promise that he will get it discounted and renewed from time to time until B. shall be able to meet it, C. is bound by the promise and A. can maintain an action against him thereon. But such a promise carries with it an implication, both that A.'s note shall be furnished for renewal before the one discounted becomes due, in season to be substituted therefor, so as to save C.'s indorsement from dishonor, and that in the

CAUSE OF ACTION.

1. The grantee in a simple quitclaim deed, in the absence of fraud or mistake, has no remedy for a failure of title against his grantor, nor has he any defense to an action for the consideration on the ground of failure thereof. (*Thorp* agt. *Keokuk Coal Co.*, 48 *N. Y.*, 253.)
2. Defendant accepted a deed of certain

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event of B.'s ability to pay the note when due, the obligation to procure a renewal shall cease. The neglect of B. to furnish a new note in time for renewal or the ability of B. to pay, discharges C. from liability. (*Brisbane* agt. *Bebee*, 48 N. Y., 631.)

8. To entitle a judgment creditor to attack a disposition made of the debtor's property, he must be able to show that the disposition was such that something remains of it or its proceeds, which ought to be applied upon his judgment. Where, therefore, one received from the debtor's wife the avails of his property in her hands with intent to defraud a creditor, with an agreement to retain or use it as the debtor and wife might want, but, before the recovery of judgment for the debt by the creditor, he has returned it or paid it out as directed by the debtor, and has settled with and been discharged from all claim by the latter, he is not liable to the judgment creditor therefor. (*Cramer* agt. *Blood*, 48 N. Y., 681.)

See BAIL. (48 N. Y.)

BOUNTIES. (*Id.*)
BANKS AND BANKING. (*Id.*)
CLOUD ON TITLE. (*Id.*)
CONTRACTS. (*Id.*)
LEASE. (*Id.*)
PARTNERSHIP. (*Id.*)
ACTION. (5 *Lansing*)
AUCTIONEER. (*Id.*)
AUCTION SALE. (*Id.*)
ARREST. (*Id.*)
CORPORATION. (*Id.*)
CREDITORS' BILL. (*Id.*)
DAMAGES. (*Id.*)
DEMAND. (*Id.*)
EJECTMENT. (*Id.*)
EQUITABLE RELIEF. (*Id.*)
ESTOPPEL. (*Id.*)
FRAUDS STATUTE OF. (*Id.*)
INSPECTORS OF ELECTION. (*Id.*)
MALICIOUS PROSECUTION. (*Id.*)
MISTAKE. (*Id.*)
MUNICIPAL CORPORATION. (*Id.*)
PARENT AND CHILD. (*Id.*)
PLEADING. (*Id.*)
PRACTICE. (*Id.*)
PRINCIPAL AND AGENT. (*Id.*)
PUBLIC OFFICER. (*Id.*)
REPLEVIN. (*Id.*)
RESCISSION OF CONTRACT. (*Id.*)
SHERIFF. (*Id.*)
TENDER. (*Id.*)
TITLE TO CHATTELS. (*Id.*)

CERTIFICATE.

See JUSTICE OF THE PEACE. (62 *Barb.*)
See CORPORATION. (5 *Lansing*)

CERTIORARI.

1. Upon a writ of *certiorari*, where the judgment of the lower court is affirmed, with costs, the costs should be taxed as in an action at issue on a question of law. (*People* agt. *Gower*, ante, 26.)
2. Section 3, chap. 570, laws of 1854, as to the question of costs in such proceedings, is repealed by section 318 of the Code, as amended in 1862. (*Id.*)
3. As section 310 of the Code only related to the costs after the issue, the provision does not destroy the right to the disbursements in the court below, which are taxable as part of the costs in the higher court. (*Id.*)
4. The remedy by *certiorari* is the proper one to review an assessment. (*W. R. R. Co.* agt. *Nolan*, 48 N. Y., 513)
5. A writ of *certiorari* will not be sustained to review the proceedings of a highway commissioner in laying out a road, where it appears that the relator was not a party to the proceedings for laying out such road, and has no direct interest in the road, either as owner of property over which it passes, or otherwise; the only interest which he claims in the proceeding being that his business as a tavern keeper will be injured by the highway to be laid out, by the diversion of travel from the road on which his tavern is located. (*People* ex rel. *Lawrence* agt. *Schell*, 5 *Lansing*, 352.)
6. It seems one whose lands are not interfered with, and having no interest except as inhabitant, taxpayer or officer of the town, is not entitled to a *certiorari* to review the action of highway commissioners of the town in laying out a highway. (*Id.*)

See ASSESSMENTS. (5 *Lansing*.)

CHALLENGE OF VOTER.

See INSPECTORS OF ELECTION. (5 *Lansing*.)

CHAMBERLAIN, CITY OF NEW YORK.

1. The clerks and officers in the bureau of the chamberlain of the city of New York, including the deputy chamberlain, were not intended by the legislature to be, and were not in fact, included within the power of appointment and dismissal which is conferred upon the comptroller by the 32d section of the charter of 1870; and it follows

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that the alleged appointment set up by the defendant in his answer to the office of deputy chamberlain, as his sole defense to the action, is invalid and void. (*Palmer* agt. *Foley*, ante, 808.)

CHARGE TO JURY.

See EVIDENCE. (5 *Lansing*.)
PARTNERSHIP. (*Id.*)
RAILROAD CORPORATION. (*Id.*)

CHASTITY.

See EVIDENCE. (62 *Barb.*)

CHATTEL MORTGAGE.

1. Where on the trial of a cause for claim and delivery of personal property under a chattel mortgage payable on demand, and the question whether a demand was made before suit brought, was not raised on the trial — evidence being given by both parties and the cause submitted: *Held*, that if a demand was necessary before suit brought, it was too late to raise it for the first time on appeal. (*Wisser* agt. *O'Brien*, ante, 209.)
2. A chattel mortgage once refiled within thirty days next preceding the expiration of the first year, continues valid without further refileing in subsequent years (See *Newell* agt. *Warren*, 44 *N. Y.*, 244). (*Id.*)
3. While personal property covered by a mortgage remains in the possession of the mortgagor and its conditions are unbroken, the mortgagor's interest is subject to levy and sale upon execution, and the purchaser obtains the same title as that of which the mortgagor was possessed. This interest he can lawfully sell, and no claim arises against him in favor of the mortgagor, from the fact that he attempts to sell or does sell a clear title. There is no wrong done the mortgagor thereby, as he may still pursue his lien under the mortgage and his rights remain the same. In an action, therefore, by the mortgagor against the purchaser it is not error to exclude evidence of such a sale. (*Hamill* agt. *Gillespie*, 48 *N. Y.*, 556.)

See FIXTURES.
LIEN. (5 *Lansing*)

CHECK.

1. A check on a bank is in substance, a bill of exchange payable on demand, and is governed by the same rules

which are applicable to those securities. *The Salt Springs Bank* agt. *The Syracuse Savings Institution*, 62 *Barb.*, 101.

2. The officers of a bank are bound to know whether the pretended drawer of a check is or is not a customer of the bank; and whether his account will justify the payment of the check. (*Id.*)

See BILLS OF EXCHANGE. (62 *Barb.*)

CHURCH.

See CORPORATION. (62 *Barb.*)

CHURCH CORPORATION.

See EJECTMENT. (5 *Lansing*.)

CITIES.

See MUNICIPAL CORPORATION. (5 *Lansing*.)

CITY OF ROCHESTER.

See ASSESSMENTS. (5 *Lansing*.)
MUNICIPAL CORPORATION. (5 *Lansing*.)

CITY OF SYRACUSE.

See ABREAST. (5 *Lansing*.)

CLERICAL ERROR.

See ASSESSMENT. (5 *Lansing*.)

CLOUD ON TITLE.

1. To constitute a cloud upon title, it is sufficient that there be a deed, valid upon its face, accompanied with a claim of title, under such circumstances that a court of equity can see that the deed is likely to work mischief to the real owner. It is not necessary, in order to maintain an action to remove the cloud and quiet the title, that the claimant should have a *prima facie* record title, which the real owner must call in extrinsic evidence to overthrow. (*Fonda* agt. *Sage*, 48 *N. Y.*, 173.)
2. Plaintiff purchased and paid for certain real estate, directing the vendor to execute to her a deed conveying the same to her, with a proviso therein, that if her son should pay her \$200 per year during her life, he should have the property after her death. By mistake, the deed was so drawn as to grant the land to her in trust for her son, upon certain conditions, not

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being a trust recognized by the statute of uses and trusts. Plaintiff received the deed without examination, and did not discover the mistake for several months thereafter. When she did discover it, with the concurrence of her son, who refused to take under the deed, she returned it to her grantor, when the same was destroyed, and a new deed was executed and delivered to her, conveying the premises in fee; subsequently the premises were levied upon, advertised and sold, under an execution against the son. The purchaser at the sheriff's sale claimed that the son had the title to the premises or an interest therein, which he had purchased, and this he threatened to enforce. *Held*, that there was not a valid and effectual delivery and acceptance of the first deed, so as to pass the title; that the son had no interest in the premises, and that an action to quiet the title could be maintained. (*Id.*)

3. Even if there was such a delivery, and the mistake could not be corrected without the aid of the court, the plaintiff remained the equitable owner, with rights superior to the purchaser at the sheriff's sale; and with all the necessary parties before it, the court could, in an action brought to quiet the title, establish plaintiff's title under the second deed, and annul any claim of title under the first. (*Id.*)

4. A defendant who claims under such a certificate and litigates the case cannot complain if the court, in the exercise of its discretion, impose upon him the costs. (*Newell* agt. *Wheeler*, 48 N. Y., 486.)

See EQUITABLE RELIEF. (5 *Lansing*.)

CODE OF PROCEDURE

- § 61. See COSTS. (48 N. Y.)
 § 122 See TRIAL. (*Id.*)
 §§ 179, 187, 201. See SHERIFF. (*Id.*)
 § 274 See PARTIES. (*Id.*)
 §§ 292, 294. See SUPPLEMENTARY PROCEEDINGS. (*Id.*)
 § 449. See ELECTION OF REMEDIES. (*Id.*)

COLLECTOR.

See PUBLIC OFFICER. (5 *Lansing*.)
 ASSESSMENT AND TAXATION. (48 N. Y.)

COLOR OF OFFICE.

See OFFICE AND OFFICER. (48 N. Y.)

COMMISSION.

1. The statute does not give the court, in which the trial of an issue of fact is had, power nor authority to issue a commission for the examination of foreign witnesses after trial and judgment in the action, although an appeal from such judgment is pending. This power can only be exercised before trial and judgment. (*McColl* agt. *Sun Mut. Ins. Co.*, ante, 452.)

COMMISSIONER OF HIGHWAYS.

1. Where a highway commissioner has received notice of the unsafe character of a bridge in his town, a year before an alleged injury has been sustained by reason of its defects, and has negligently omitted to cause it to be repaired, such commissioner is guilty of a wrong rendering him liable for all its consequences to those who might be injured by it. (*Lament* agt. *Haight*, ante, 1.)
2. It is the commissioner's wrong exclusively, and not that of his successors in office, and he may be sued for it as a mere individual, relying upon his official obligation to establish the duty he has violated. (*Id.*)
3. Such a case is, therefore, not one where the action could be continued against his successor in office. (*Id.*)
4. If the requisite notice has been given the commissioner, and he has funds, or could by reasonable official diligence have procured them, or without them could have caused the bridge to be repaired on the credit of the town, he is bound to have the repairs made, and a failure to do so, resulting in an injury to another, will render him liable to an action. (*Id.*)
5. But the commissioner is not bound to make use of his own personal exertions to repair the bridge himself, or so far guard it by means of admonitions to the persons using it, as would inform them of its condition in order to protect himself against liability for injuries which might be otherwise occasioned. (*Id.*)
6. An overseer of highways has no right in making repairs upon a highway within his district, in other respects suitable and proper, to change a natural watercourse, or the natural course of surface water drainage, so as where it had not been previously accustomed to flow, or to increase considerably in volume and quantity either

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the waters in a natural watercourse or from surface drainage, flowing upon such land, to the injury of the owner thereof. (*Id.*)

7. The public must construct an repair their way with reference to the rights of adjoining owners of lands. (*Id.*)

See MUNICIPAL CORPORATION. (5 Lansing.)

COMMISSIONERS TO BOND MUNICIPAL CORPORATIONS.

See RAILROAD MUNICIPAL BONDS. (5 Lansing.)

COMMON CARRIER.

1. To sustain an action against a common carrier for failing to deliver goods, the plaintiff must be the owner or have some special interest in them. (*Thompson agt. Fargo, ante, 176.*)
2. Where a shipper and owner of goods, at the time of delivering the same to an express company for transportation, also deliver to the express company for their signature a blank receipt in their possession, filled up by him at his office, containing the names of both parties, and a series of conditions and clauses regulating the manner of transportation and the liability of the express company in certain cases and contingencies, and such receipt at the time of the delivery of the merchandize is presented by the shipper to the express company for their signature, and is signed by the latter and returned to the shipper, it constitutes a special contract, and binding upon both parties when acted under. (*Falkenan agt. Fargo, ante, 325.*)
3. Where such contract provides that the express company is not to be held liable for any loss or damage by fire, they are not liable where the goods shipped are burned up, without any fault or neglect on the part of the company, while in transitu. (*Id.*)

See EXPRESS COMPANIES. 48 N. Y.
PRINCIPAL AND AGENT. (*Id.*)
RAILROAD CORPORATIONS. (*Id.*)
STEAMBOATS. (*Id.*)
TELEGRAPH COMPANIES. (*Id.*)
Redpath agt. Vaughan (Mem), (48 N. Y., 655.)
Gibbs agt. Van Buren. (48 N. Y., 661.)

4. The defendant was a common carrier, owning and operating a railroad extending from Baltimore, (Md) to Park-

ersburg, (W. Va.), on the Ohio River, but not owning any railroad terminating either in the city of New York, or at Maysville, (Ky.) On the 1st of September, 1866, one of the plaintiffs called at the defendant's freight office in New York, and stated to the freight agent that he was desirous of sending certain merchandize to his firm at Maysville, and inquired at what rate the defendant would carry the same. The agent mentioned the rate, and instructed the plaintiff how to mark, and where to deliver, the freight. The plaintiff did not accept the proposition, at the time, or agree to ship any goods: but directed B. & Co., of whom he had purchased certain goods, to mark the same in the manner specified by the freight agent, and to send the same to the freight depot he had named. On the 19th of Sept., B. & Co. delivered such goods at the depot, marked as directed, and addressed to the plaintiffs at Maysville.

Held, 1. That the conversation between the plaintiff and the freight agent did not amount to an agreement by the former to ship any goods; and that the sending of the goods to the place designated, marked as directed, 18 days afterwards, could not be said to be an acceptance, by the plaintiffs, of what was but an offer, or proposition, on the part of the defendant. 2 That the contract whatever it was, was made when the plaintiffs, on the 19th of Sept., through B. & Co., shipped the goods in question and took a receipt therefor. 3. That the contract between the parties was contained in the receipt then given. (*Ricketts agt. The Baltimore and Ohio Railroad Company, 61 Barb., 18*)

5. And, it being by the express terms of such receipt, agreed that that company should alone be held answerable for the goods in whose actual custody they should be at the happening of loss:

Held, that for a loss occurring after the delivery thereof by the defendant at the end of its road, at Parkersburg, to other carriers, for transportation by steamboat from that place to Maysville, the defendant was not liable. (*Id.*)

See CRIMINAL LAW. 61 Barb.
LIEN. (*Id.*)
RAILROAD COMPANIES. 62 Barb.

7. A railroad company is not bound by the contract of its agent for transportation beyond the termini of its road, in the absence of express authority given him in that respect, and where the making of such contracts has not become an established business of the

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road by the custom of those having general authority in its management. (*Wait* agt. *Albany & Susquehanna R.R. Co.*, 5 *Lansing*, 475.)

8. An exemption from the ordinary liability of a common carrier, provided for in a bill of lading given by one carrier, does not inure to the benefit of a connecting carrier, where the contract is merely for delivery to the latter for further transportation. And this is so where a contract exists between the two carriers for the reciprocal transportation of freight and the division of the receipts, and the shipper has paid through charges. (*Aetna Ins. Co.* agt. *Wheeler*, 5 *Lansing*, 480.)

9. Where a carrier, having to deliver goods to the defendants, connecting carriers, for further transportation, placed them in the defendants' warehouse, and notified them of the fact.

Held, that there was a delivery to the defendant; and that this was so, notwithstanding the two carriers used the warehouse in common in the transshipment of goods to each other's lines. (*Id.*)

10. Nor does it alter the case if an agent, employed by the delivering carrier, moves the freight to the warehouse, where such agent is in the pay of both carriers for the moving of freight between them, (*Id.*)

11. A bill of lading given at Milwaukee for goods consigned to consignees at Ogdensburgh, on the margin of which there is an address to parties at Boston, and upon which the freight charges to Boston are paid in full, and where the carrier has connections at Ogdensburgh extending to Boston, and an agreement for transportation of its freight there, undertakes to deliver at Ogdensburgh only, to be forwarded. (*Id.*)

COMMON COUNCIL

See ASSESSMENTS. (5 *Lansing*.)
MUNICIPAL CORPORATION. (*Id.*)

COMMON SCHOOLS.

1. A teacher of common schools, who claims, under a regular appointment, a salary due her for such services, cannot have a *mandamus* to compel the inspectors of common schools to examine and audit such salary. She has a remedy at law if she holds under a legal appointment. (*The People* agt. *The inspectors of Common Schools*, ante, 322.)

COMPLAINT.

See PLEADING. (48 *N. Y.*)

1. A complaint, in an action brought by a bank against executors, to recover the amount of an over credit given to the testator, by mistake, a part of which was paid to the testator, in his lifetime, and the rest to the executors, states only one cause of action; and is not demurrable on the ground that several causes of action have been improperly united. (*The Tradesmen's National Bank* agt. *McFeely*, 61 *Barb.*, 522.)

See PRACTICE. (61 *Barb.*)

COMPROMISE.

1. Where, upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with knowledge, and there was no error or fraud. (*Ryan* agt. *Ward*, 48 *N. Y.*, 204.)

2. Upon the breach of a contract between the parties, defendants became liable to plaintiffs in damages to the amount of \$6,400, which amount was undisputed. Defendants being unable to pay, it was agreed that if they would borrow of their friends and pay the sum of \$3,500, plaintiffs would settle and compromise, leaving it to defendant's honor to pay, when they became able, an additional sum, which, with the \$3,500, would amount to seventy five per cent. of the claim. Defendants thereupon borrowed and paid to plaintiffs the \$3,500. *Held*, that there was no consideration for the agreement of compromise, and that the plaintiffs were not concluded from suing and recovering the residue. The question is not affected by the fact that defendants received from the lenders checks for the amounts borrowed, which they delivered to plaintiffs in lieu of the money. (*Bunge* agt. *Koop*, 48 *N. Y.*, 225.)

COMPTROLLER'S DEED.

See EJECTMENT. (61 *Barb.*)

CONFESSIONS.

See DIVORCE. (62 *Barb.*)
EVIDENCE. (62 *Barb.*)

CONGRESS.

See ACTS OF CONGRESS. (48 *N. Y.*)

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CONSIDERATION.

See BOUNTIES. (48 N. Y.)
 CONTRACTS. (*Id.*)
 RAILROAD CORPORATIONS. (*Id.*)
 Schott agt. Schwartz (Mem.), 48 N. Y., 666.)

CONSIGNOR AND CONSIGNEE.

1. Where the consignor of property, upon its shipment and before delivery, draws a bill of exchange upon the consignee, and procures the same to be discounted at a bank upon the security of the bill of lading, which is transferred and delivered with it, the bank acquires title to the property described in the bill of lading, conditional upon the acceptance of the draft; upon such acceptance the title passes to the acceptor; but upon refusal to accept, the title continues unimpaired, and upon the receipt by the consignee of the property and its conversion, he is liable to the bank for the money advanced upon it. (*Marine Bank agt. Wright*, 48 N. Y., 1.)
2. Where the consignor is indebted to the consignee for advances, and has agreed to give him a prior security upon the property, the lien of the latter is good as against the former; but the consignee does not thereby obtain any right to the property, as against a *bona fide* pledge of the bill of lading for value, made prior to the delivery of the property to the consignee. (*Id.*)
3. The consignor of goods to a distant consignee, who is the owner, is the agent of the consignee for the purposes of shipping. (*Nelson agt. H. R. R. Co.*, 48 N. Y., 498.)

CONSTABLE.

1. Where a justice of the peace acquires jurisdiction to issue an attachment under section 32 of the non-imprisonment act, against the property of a defendant, on the ground of the latter being a non-resident, and issues the same, a constable seizing property of the debtor thereon, and subsequently levying upon it by virtue of an execution issued in the attachment suit, will, by such seizure and levy, acquire—if his return to the attachment be not defective—such a special property in the goods as will enable him to recover their value, against any person illegally appropriating them. (*Stone agt. Miller*, 62 Barb., 230.)
2. But an attachment, and levy by virtue thereof, cease to bind the goods,

and consequently the title of the officer levying determines, when a judgment is recovered and a levy made on the same goods by virtue of an execution issued in the suit. (*Id.*)

3. After a levy upon the execution, the officer holds the goods by virtue of it, and by virtue of the attachment; except so far as the priority of levy on the attachment enures in favor of the execution.

See ATTACHMENT. (62 Barb.)
 JUSTICES OF THE PEACE. (62 Barb.)

CONSTITUTIONAL LAW.

1. The law of this State passed in 1822, providing that the governor may in his discretion, deliver over to justice any person found within the State who shall be charged with having committed *without the jurisdiction of the United States*, any crime except treason, which by the laws of this State, if committed therein, is punishable by death or by imprisonment in the state's prison, is *unconstitutional and void*. (*In the matter of Vogt*, ante, 171.)
 2. The petitioner, it appeared was in custody under a warrant issued by the governor of this State, at the request of the Belgian minister committing him, for surrender to the authorities of that government, as a person charged with having committed murder, arson and robbery in Belgium. It also appeared that he was held under a commitment to answer an indictment for grand larceny. (*Id.*)
 3. No provision by *treaty* for the extradition of persons charged with crimes, exists between the United States and Belgium.
- Held*, that the warrant for the surrender of the petitioner to the Belgium authorities is unconstitutional and void, and insufficient for his detention. (*Id.*)
4. But the commitment upon the indictment for grand larceny, being under a statute of the State, for bringing stolen goods into this State, his discharge was refused. (*Id.*)
 5. It has been settled by authority that an action in *equity* may be maintained to prevent a *cloud* to be cast upon real estate, as well as to remove a cloud already created. (*Mann agt. City of Utica*, ante, 334.)
 6. Consequently an action to restrain a

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city from proceeding to sell real estate under a prior assessment, which is claimed to be irregular under the city charter, is properly brought by the owner of the property. (*Id.*)

7. And where pending the litigation in such action, it is apparent that such irregularities exist, and the defendants (the city) apply to and procure an act to be passed by the legislature by which the assessment is hereby confirmed and declared to be of the same force and effect as if no informality or error had occurred in the making of said assessment, and the amount assessed shall be a lien on the property assessed:
8. The act of 1870 (*ch.*, 383), known as the (New York) City Tax Levy Laws, providing and authorizing the court of special sessions of that city to be held by less than two police justices, is unconstitutional and void. (*Huber* agt. *The People*, ante, 375.)
9. Therefore, all criminals convicted and sentenced in that court by one justice are entitled to be discharged. (*Id.*)
10. The provision in the state constitution, that no person shall be deprived of property, &c., without due process of law (Art. 1, § 6), does not require a legal proceeding according to the course of the common law, nor must there be a personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on, and an opportunity offered him to defend. The opportunity to defend must not be colorable and illusory; but it matters not, though it may be difficult, so long as it is not impracticable. (*Happy* agt. *Mosher*, 48 N. Y., 313.)
11. The act of 1862 (chap. 482, Laws of 1862), providing for the "collection of demands against ships and vessels," is not repugnant to the above-mentioned provision, as it provides a reasonable notice and gives an opportunity to litigate the lien. (*Id.*)
12. The control conferred upon congress by the Constitution of the United States (art. 1, § 8), over the state militia, begins when they are mustered into the service of the United States. Arrangements by the States to procure or aid in calling them forth are not unauthorized, nor are regulations, fixing and limiting the amount of bounties, or rewards given to procure their services; therefore, section 4, of chapter 20 of the Laws of 1865, which pro-

hibits the payment of any sums for the procurement of volunteers, save as provided for by that act, is not in conflict with the Constitution of the United States, and an agreement to pay a sum prohibited by that section is void. (*Powers* agt. *Shepard*, 48 N. Y., 540.)

See ASSESSMENT AND TAXATION. 48 N. Y., 23.)

- 13 The act of the legislature of February 27, 1871, (*Laws of 1871, ch. 57.*) in relation to the widening and straightening of Broadway in the city of New York, &c., which authorizes this court, on good cause shown, to open the order of confirmation, and to cause the question of valuation to be re examined, is not unconstitutional as impairing the obligation of contracts, or as depriving a person of property without due process of law. *Matter of widening Broadway*, (61 Barb., 483.)
 - 14 The 5th section of the act of the legislature of April 19, 1871, (*Sess. Laws, ch. 583.*) is not unconstitutional. (*Leventhal* agt. *The Mayor, &c., of New York*, 61 Barb., 511.)
 15. An act of the legislature giving to courts of special sessions in a specified county exclusive power to hear, try and determine, amongst other offenses, "all cases of petit larceny not charged as a second offense," arising within the county, is constitutional and valid; and a trial and conviction of an individual, before a court of special sessions, within said county, for the offense, of petit larceny as a first offense, is by a court of competent authority. (*The People ex rel Stetson* agt. *Rawson*, 61 Barb., 619.)
- See LEGISLATURE. (61 Barb.)
MUNICIPAL CORPORATIONS. (*Id.*)
SHIPS AND SHIPING. (*Id.*)
16. The constitution, in guarantying the right of "trial by jury as it has been heretofore used," intended to embrace juries in justices' courts, as they existed, and had been used, before the constitution was adopted. (*Knight* agt. *Campbell*, 62 Barb., 16.)
 17. The word "jury," as used in the constitution, does not mean a jury of twelve men exclusively. A jury of six men, in a justice's court, is as much a jury, in the eye of the law, as a jury of twelve men in a court of record; and is the jury which had been "heretofore used" in that tribunal, at the adoption of the constitution.
- See JUSTICES' COURTS. (62 Barb.)
18. Section 15 of the new judiciary

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article (article 6) of the Constitution, in providing that the salaries of county judges "shall be established by law," confines the power of fixing such salaries to the legislature. (*Healey* agt. *Dudley*, 5 *Lansing*, 115.)

19. And *held*, that the statute conferring power on boards of supervisors to establish such salaries, is unconstitutional and void. (*Id.*)

20. The plaintiff, a railroad corporation, incorporated with reservation to the legislature of the right to alter, modify or repeal its charter, laid its tracks upon lands in a corporate village, which it had purchased, and for which it had taken a deed in fee simple absolute from the owners. After this a map was made and filed in a partition suit between third parties of lands in the village, laying out, numbering and naming certain streets over the tracks.

Held, that an act of the legislature which declared that such streets should be recognized as the streets of the village, without provision for compensating the plaintiff, was not in conflict with the prohibition of the Constitution as to taking private property for public use without just compensation. (*Boston and Albany Railroad Co.* agt. *President, &c., of Greenbush*, 5 *Lansing*, 461.)

21. *Held*, further, that the "Act to regulate the construction of roads and streets across railroad tracks" (Laws 1853, chap. 62) was not opposed to the same provisions in its application to this case. (*Id.*)

22. Section 5 of the "act to make provision for the local government of the city and county of New York" (Laws of 1871, chap. 583), which section prohibits the entry of judgments against that city, other than those upon issues of law, except upon verdict of a jury, is not void as being a general provision contained in a local bill. (Const. art. 3, § 16). (*Lewenthal* agt. *Mayor, &c., of N. Y.*, 5 *Lansing*, 532.)

See COUNTY JUDGE. (5 *Lansing*.)
STATUTES CONSTRUED. (*Id.*)

CONSTRUCTION.

Defendant agrees to convey to plaintiffs a house and lot in the city of New York. In the description contained in the contract, the lot was stated as "being in depth, on Clinton street, 120 feet, including the stable situated on

the rear of said premises." He executed and delivered a deed to carry out the agreement, which followed the description contained therein, except omitting any reference to the stable. It was supposed at the time of the execution of the contract and deed, that the stable was upon the 120 feet, but subsequently it was discovered that, in order to include the stable, the lot should be 131 feet and ten inches deep. In an action brought by plaintiffs for specific performance,—*Held*, that under the well settled rule that, in the construction of grants, courses and distances must yield to fixed, known monuments, plaintiffs were entitled to a deed that would include the land upon which the stable stands. (*White* agt. *Williams*, 48 *N. Y.*, 344.)

See CONTRACTS. 48 *N. Y.*)
INSURANCE, FIRE. (*Id.*)
INSURANCE, LIFE. (*Id.*)
INSURANCE, MARINE. (*Id.*)
LIBEL. (*Id.*)
WILLS. (*Id.*)

CONSTRUCTION OF CONTRACT.

See CONTRACT. (5 *Lansing*.)
EVIDENCE. (*Id.*)

CONSTRUCTION OF STATUTES.

1. An amendment to a section of an act which declares that the section is amended "so as to read as follows:" Copying the original section with slight changes, does not repeal, but leaves the former section in operation from the time of its passage, and the amendments or modifications take effect from the time of their enactment. (*Moore* agt. *Mausert*, 5 *Lansing*, 173.)

See COUNTY JUDGE. (5 *Lansing*.)
JUSTICES' COURT. (*Id.*)
RAILROAD MUNICIPAL BONDS. (*Id.*)

CONSTRUCTION OF WILL.

See ACCUMULATION. (5 *Lansing*.)
DEVISE. (*Id.*)
EVIDENCE. (*Id.*)

CONSTRUCTIVE NOTICE.

1. A purchaser of land is chargeable with notice by implication of every fact affecting the title, which would be discovered by an examination of the deeds or other muniments of title of his vendor, and where he has knowledge of any facts sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence,

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would lead to actual notice of some rights or title in conflict with that he is about to purchase, the law will presume he made the inquiry, and will charge him with the notice he would have received if he had made it. (*Cambridge Valley Bank agt Delano*, 48 N. Y. 326.)

2. No more than ordinary prudence and diligence is required, however; and where, therefore, the vendor's deed refers to an incumbrance upon the land, the fact that the incumbrance described was discharged of record prior to the execution of such a deed is not sufficient to charge a purchaser with constructive notice of the existence of another and entirely different lien, which nowhere appears upon record as a charge upon the premises. (*Id.*)

See POSSESSION. (5 *Lansing*.)

CONTEMPT.

See SURREGATE. (5 *Lansing*.)

CONTRACTS.

1. A contract voluntarily signed and executed by a party, in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided upon the ground of his negligence or omission to read it, or to avail himself of such information. (*Breese agt. U. S. Tel. Co.*, 48 N. Y., 132.)
2. In an assignment of an executory contract for the sale of land, there is no implied covenant on the part of the assignor of title to the land in the vendor; all that can be implied is a warranty that the assignor owned the contract, and had the right to assign it, and that the signatures thereto are genuine. (*Thomas agt. Bartow*, 48 N. Y., 193.)
3. Where the vendor's relation to the title is such that it is possible and feasible for him to perform the contract, and the assignee is placed in such a relation thereto that he can compel performance, the latter cannot repudiate a contract made by him in consideration of the assignments, on the ground of failure of consideration. (*Id.*)
4. The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice, printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried. (*Rawson agt. Pa. R. R. Co.*, 48 N. Y., 212.)

5. If, however, the passenger's attention is called to it when purchasing his ticket, or if he knew of it when he purchased, the law will presume, in the absence of any objection upon his part, that he assented to the terms. The contract is made, and rights and duties of the parties are determined, when the ticket is purchased. A discovery by the passenger of the notice after he has entered upon his journey, does not affect his rights. (*Id.*)

6. Two instruments, executed at the same time, and relating to the same subject-matter, must be construed together as if one instrument. (*M. B. Co. agt. Zingsen*, 48 N. Y., 247.)

7. Where it appears by the terms of an agreement or the nature of the case, that the performance of one party was to precede that of the other, an action can be maintained against him who was to do the first act, although nothing has been done or offered by the other. (*Id.*)

8. Where a manufacturer of goods, which are known in the market, and the different qualities distinguished by numbers, contracts to sell and deliver goods from his factory, of certain numbers, in an action upon the contract it is not material whether the goods delivered are of equal or inferior quality to those of corresponding numbers, manufactured at other factories, or whether they are or are not merchantable. If they are the numbers contracted for as manufactured at the contractor's factory, the contract is fulfilled. (*Beck agt. Sheldon*, 48 N. Y., 365.)

9. Parties cannot, by agreement, convert a judgment into a personal mortgage or a bill of sale, or give to it any greater effect than the law gives to it. A parol agreement, therefore, that a judgment shall be a lien upon all the debtor's personal property, will not be enforced in equity, even as against subsequent assignees who assented to the arrangement. (*EARL, C.*) (*Lanning agt. Carpenter*, 48 N. Y., 408.)

10. Defendant agreed to run plaintiff's boat from Oswego to Martinsburgh; "risks of navigation" assumed by plaintiff. Defendant was prevented from performing by the fact that the boat was too large to pass through the locks on the Black River canal.

Held, that the term "risks of navigation," as used in this agreement, had a broader signification than "perils of navigation," and that plaintiff assumed all the risks attendant upon the navi-

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gation through the canal which were beyond the control of defendant including the risk in question. (*Pitcher* agt. *Hennessey*, 48 N. Y., 415.)

11. A covenant in a lease whereby the lessee agrees to bear, pay and discharge all taxes and assessments which shall be imposed upon the demised premises during the term, is broken when the lessee neglects to pay a tax or assessment duly imposed. It is not simply a contract of indemnity, but by it the tax or assessment, as between the parties, becomes the debt of the lessee. The lessor, therefore, can maintain an action thereon without first paying the tax or assessment, and as damages he is entitled to recover the amount of such tax or assessment. (*Rector, etc., of Trinity Church* agt. *Higgins*, 48 N. Y., 532.)

12. Parties have the right to make a contract contravening the rule that actual compensation will only be given for actual loss, and when the intent so to do is expressed in apt and suitable language, courts of justice will enforce it. (*Id.*)

13. A written instrument not under sale is inoperative and ineffectual to pass the legal title to lands. (*Morris* agt. *Salisbury*, 48 N. Y., 636.)

14. Where an agreement is executed in duplicate, if there are variances between the two instruments, they are to be construed together in determining the meaning of the parties. One cannot be regarded as more expressive of the intent of the parties than the other, but they are entitled to equal faith and credit. The want of accuracy in the one is not proved by the mere production of the other. The intent is to be arrived at by an examination of the terms and provisions which are identical in each, thus determining the objects and purposes contemplated. And where the contract bears such inherent evidence of its true meaning that it carries a clear legal conviction, evidence of the intention of the parties or of surrounding circumstances is properly excluded. (*Id.*)

15. Plaintiff claimed a title under a contract executed in duplicate between M. & Co. (of which firm plaintiff was a member) and B. The instrument delivered to M. & Co. purported to convey to them "all the land and timber, except the hard wood, on one hundred acres of land;" in that delivered to B. the words were "bark and timber;" aside from this the two were identical. The scope and tenor of the contract

indicated that the land itself was not intended to be conveyed. *Held*, that the title of B. to the land was not divested, and that the possession of plaintiff was subordinate thereto. Also, that evidence that the price paid by M. & Co. was the full value of the land, bark and timber together, except the hard wood, was immaterial, and its exclusion no error. (*Id.*)

See CONSTITUTIONAL LAW. (48 N. Y.)
CORPORATIONS.
EXPRESS COMPANIES. (48 N. Y.)
INSURANCE, LIFE
INSURANCE, MARINE.
OFFICE AND OFFICER. (48 N. Y.)
PARTNERSHIP. (*Id.*)
RAILROAD CORPORATIONS. (*Id.*)
SALES.
STATUTE OF FRAUDS.
Wilder agt. *Stearns* (Mem.), (48 N. Y., 656.)
Gibbs agt. *Van Buren* (Mem.), (48 N. Y., 661.)
Brackett agt. *Wyman* (Mem.), (48 N. Y., 667.)

25. Where the defendants authorized the plaintiff, a storekeeper, to furnish provisions and tools to one O., a railroad contractor, on their (defendant's) account, and directed that O. should give orders therefor.

Held, that the terms of the credit should receive a liberal construction in view of O.'s business and the purposes for which the articles were required. (*Gilbert* agt. *Sage*, 5 Lansing, 287.)

See AUCTION SALE. (5 Lansing)
CANAL CONTRACTOR. (*Id.*)
CARRIER. (*Id.*)
CORPORATION. (*Id.*)
DAMAGES. (*Id.*)
DEMAND. (*Id.*)
EQUITABLE RELIEF. (*Id.*)
EVIDENCE. (*Id.*)
FRAUDS STATUTE OF.
INSURANCE. (*Id.*)
LIEN. (*Id.*)
REPLEVIN. (*Id.*)
RESCISSION OF CONTRACT. (*Id.*)
SALE OF CHATTELS. (*Id.*)
STATUTE OF LIMITATIONS. (*Id.*)
TRUSTS AND TRUSTEES. (*Id.*)

CONTRACT FOR SALE OF LAND.

See MISTAKE. (5 Lansing.)
TRUSTS AND TRUSTEES. (*Id.*)

CONTRIBUTION.

See *Dongass* agt. *Dudley* (Mem.), (48 N. Y., 688.)

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CONVERSION.

1 This action was brought to recover the value of 1364 gallons of wine, belonging to the plaintiff, which was levied upon and sold by the defendant under an execution against S. and L. (*Jaager* agt. *Kelly*, ante, 122.)

2. The defendant's counsel demanded to go to the jury, 1st, upon the question whether the sale of the 15 casks of wine by L. to the plaintiff was in fraud of S., a creditor of L. 2nd. As to what were the contents of the casks. 3rd. Also requested the court, to instruct the jury that there was no evidence upon which they could find that the casks contained 1364 gallons of wine. 4th, That interest by way of damages on the value of the wine could not be included in their verdict for the plaintiff—The court refused these requests and directed the jury to find for the plaintiff, leaving it to them to assess the damages.

Held, that there was no contradictory evidence on the question of title, and no evidence to prove any fraud in the sale.

Held, also that the inadequacy of price was not a sufficient ground to hold the sale fraudulent, or to sustain a verdict for the defendant.

Held, also, that there was some evidence but slight, that L. disposed of the wine to prevent its being reached by S. as a creditor, but there was none affecting the plaintiff with a guilty knowledge or that his purpose was not honest and fair.

Held, also that there was evidence *prima facie* that the casks contained wine. There was evidence that the casks were gauged by government officials, as containing the quantity stated. As against an alleged trespasser the proof was quite sufficient—It was for him to give evidence to raise a doubt, before the jury could be called upon to decide it (*Id*)

3. There is no doubt that interest may be added to the value at the time of the conversion as damages. (*Id*.)

4. B gave to G. a verbal order for a bill of furniture to be shipped to B. at Milwaukie; prior to its arrival B. left Milwaukie, leaving word that the furniture be returned to G. Upon the arrival of the furniture at Milwaukie it was seized by the sheriff as the property of B. by virtue of a writ of attachment against him. While in the possession of the sheriff, G. assigned

his interest therein to plaintiff. After the assignment, judgment was perfected in the action, wherein the attachment was issued and execution issued thereon. By virtue thereof the sheriff levied upon and sold the property under the directions of defendant, the judgment creditor. No demand for the goods was made by plaintiff.

Held, that the seizure of the property, by virtue of the attachment, did not change the title; it remained in G., and was transferred to plaintiff. Every fresh interference therewith was a new wrong, and the seizure and sale thereof by virtue of the execution was a conversion, for which plaintiff could recover. (*Hicks* agt. *Cleveland*, 48 N. Y., 84.)

5. A demand and refusal to deliver do not establish a conversion, where, at the time of the demand, the property in question is not in existence. (*Salt Springs National Bank* agt. *Wheeler*, 48 N. Y., 492.)

6. The accidental loss or destruction of an article, by one lawfully in its possession, is not a conversion. (*Id*.)

See CAUSE OF ACTION. (48 N. Y.)
Pike agt. *Walter* (Mem.), (48 N. Y., 631).

CONVEYANCE.

See COVENANT. (48 N. Y.)
DEEDS. (*Id*.)
TRUSTS AND TRUSTEES. (5 *Lansing*.)

CONVICTION.

See WITNESS. (5 *Lansing*.)

CORONER'S INQUEST.

See EVIDENCE. (5 *Lansing*.)

CORPORATION.

1. The salary allowed to an officer of a corporation is presumed to be for services to be performed by him as such. Where, there is, with the assent and co operation of such officer, all the property business and franchises of the corporation are sold, so that he has no further duty to perform, there is no basis in law or equity for a claim, upon his part, that the salary continues, and the contract, as to salary, will be deemed to be canceled, although the corporation itself is not dissolved. (*L*.)

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I. Ferry Co. agt. Terbell, 48 N. Y., 427.)

See BANKS AND BANKING. (48 N. Y.)
EXPRESS COMPANIES. (*Id.*)
INSURANCE FIRE. (*Id.*)
INSURANCE LIFE. (*Id.*)
INSURANCE MARINE. (*Id.*)
PLANKROAD COMPANIES. (*Id.*)
RAILROAD CORPORATIONS. (*Id.*)

2. An action cannot be maintained against a corporation, by a stockholder, to effect a forfeiture of the charter, for non-user within a year. And in any case, even when the action is brought by the Attorney-General, a receiver cannot be appointed until judgment in the action. (*Gilman agt. The Green Point Sugar Company*, 61 Barb., 9.)
3. A lease, executed by one gas company to another, of its works and property, for five years, with the privilege of renewal for five years longer, the necessary effect of which is to suspend the ordinary business of the lessor for more than one year, is invalid, as against the stockholders not consenting to its execution. (*Copeland agt. The Citizen's Gas Light Company*, 61 Barb., 60.)
4. An action to set aside such lease may be brought by a stockholder in the lessor's company who has not consented to, or ratified the execution of such lease, in behalf of himself and other stockholders similarly situated. (*Id.*)
5. In such an action the court is not bound to adjust the equities between the lessor and the lessee, where such equities are not embraced in the pleadings containing the issue tried. (*Id.*)
6. Where an election of governors of a hospital is required by its by-laws, to be held on a specified day in every year, and the officers of the corporation neglect, for several years, to hold an election, a *mandamus* will be issued, on the application of members of the corporation, to compel the defendants to hold an election for governors, within 60 days from the day fixed in the by-laws for elections, in accordance with the statute, (1 R. S. 604, § 8;) and this without proof of any demand that an election be held. (*The People ex rel Walker agt. The Board of Governors of the Albany Hospital*, 61 Barb., 397.)
7. A neglect to hold an election, for 8 or 10 years, cannot be accidental; and when so long continued, and occurring in so many instances, is equivalent to a refusal. (*Id.*)
8. Notwithstanding the language of section 12 of the act of the legislature of February 17, 1848, to authorize the formation of corporations for manufacturing and other purposes (*Laws of 1848, ch. 40*), which requires an annual report to be made by every company organized under such act, and in case of a failure to make such report, makes the trustees jointly and severally liable "for all the debts of the company then existing, and for all that shall be contracted before such report shall be made," is broad enough to include debts due from the corporation to individual trustees, yet the fundamental rule which lies at the very foundation of all law, that no person can, by his own transgression, create a cause of action in his own favor, against another, must be applied to the trustees of such a corporation, and debts of that nature held not to be within the provisions of the statute. (*Briggs agt. Easterly*, 62 Barb., 51.)
9. Claims of a portion of the trustees of a manufacturing corporation, against the corporation, although they may be within the letter of the act, yet not being within the mischiefs intended to be remedied or prevented by it, nor within its spirit and intention, they are not within its provisions. (*Id.*)
10. Where the business specified in the charter of a corporation is a perfectly legitimate business, and the corporation is legally created, the subsequent abuse or perversion of its corporate powers, though it may furnish a reason why the legislature or the courts, should amend the charter and annul the corporation, will not destroy the body corporate. It is still a legal entity, and bound to answer the claims of creditors, although the intention of those who participated in its creation was to effect illegal purposes. (*Clancy agt. The Onondaga Fine Salt Manufacturing Co.*, 62 Barb., 395.)
11. Where the purposes attempted to be accomplished through a corporation are illegal, contracts and agreements entered into to secure the end must be equally so.
12. The right of a creditor of a corporation to sue a stockholder for a debt of the corporation, after the return of an execution issued against the corporation unsatisfied, is not independent of, but subordinate to, the right of the directors to compromise the debt, or to forfeit the stock of the stockholder. (*Mills agt. Stewart*, 62 Barb., 444.)
13. And after the directors have, in good faith and in conformity with the char-

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ter of the corporation. forfeited the stock of a stockholder, the latter ceases to be liable to the creditors of the company, and no action can be maintained against him by such creditors for the recovery of their debt. (*Id.*)

14. Where in an action against a corporation, the defendant's corporate existence is directly put in issue by the pleadings, the first step in the progress of the trial is to establish the fact by proof, that the defendant is a corporation, capable of contracting a debt, and of being sued therefor. (*Van Buren* agt. *The Reformed Church of Gansevoort*, 62 Barb., 495.)

15. The existence of a church proper as an organized body, is not recognized by our municipal law. In order to give an organization for public worship legal rights, and to impose upon it legal obligations as a corporate body, there must be either a special law declaring its existence, or an incorporation under the provisions of the general law relating to religious societies. (*Id.*)

16. Mere user, however, or the assumption of the corporate capacity, limited to religious observances, is not sufficient to establish a corporation *de facto*. (*Id.*)

17. Church music, in small country villages or hamlets, being usually gratuitous, the mere fact that one sings in a choir, or plays on an instrument as an accompaniment, on occasions of church service on the sabbath, raises no implication of pecuniary liability, against the corporate body. (*Id.*)

18. Such services will be presumed to have been gratuitous. And to authorize a recovery for services as an organist, it must be clearly proved that there was an actual employment of the plaintiff by the defendant, and a promise, binding on the corporate body, to pay the plaintiff for the service. (*Id.*)

See ATTORNEY. (62 Barb.)

19. A general resolution of a corporation provided that certificates of its stock should be signed by its president and treasurer.

Held, That the company was liable for money advanced to the treasurer, upon certificates of shares of stock of the company, signed in conformity with such resolutions, issued to the treasurer himself, although the shares were, in fact, spurious and fraudulently issued; it appearing that they were taken by the plaintiff in good faith.

(*Titus* agt. *President, &c., of Great Western Turnpike Road*, 5 Lansing, 250.)

20. The case of *Clafin* agt. *The Farmers and Citizen's Bank* (25 N. Y., 293), considered and distinguished. (*Id.*)

See EXPRESS COMPANY. (5 Lansing.)
INSURANCE. (*Id.*)
MUNICIPAL CORPORATION. (*Id.*)
PRACTICE. (*Id.*)
RAILROAD CORPORATION. (*Id.*)
RELIGIOUS CORPORATION. (*Id.*)

COSTS.

1. Upon a writ of *certiorari*, where the judgment of the lower court is affirmed, with costs, the costs should be taxed as in an action at issue on a question of law. (*Shelton* agt. *Gower*, ante, 26.)

2. Section 3, chap. 570, laws of 1854, as to the question of costs in such proceedings, is repealed by section 318 of the Code, as amended in 1862. (*Id.*)

3. As section 310 of the Code only related to the costs after the issue, the provision does not destroy the right to the disbursements in the court below, which are taxable as part of the costs in the higher court. (*Id.*)

4. Upon an order of the county court granting a new trial in an action in that court upon a case and exceptions there made, the two items of \$20 before argument and \$40 for argument, cannot be allowed on the taxation of costs. Such a case is expressly excepted from the operation of sub. 5, §307 by its very terms. The appeal having been taken under the second paragraph of §344 of the Code. (*Woodbury* agt. *Morton*, ante, 56.)

5. Where the plaintiff had an order for a new trial in the county court, on an appeal from a verdict rendered for the defendant in that court, in an action originating in a justice's court, where the plaintiff had a judgment in his favor, and the general term of the supreme court, on appeal, affirmed the order, granting the plaintiff a new trial, and the attorneys for the respective parties, previous to the decision of the supreme court, entered into a stipulation that in case defendant was defeated in the supreme court on such appeal and the court refused to allow him an order to appeal to the court of appeals, the plaintiff might enter judgment in the action against the defendant "for the amount of the judgment

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rendered by the justice with costs of this action to be taxed."

Held, that the plaintiff, on retaxation of costs, was not entitled to interest on the justice's judgment. The stipulation did not give him any interest, and the judgment did not draw interest by operation of law as the appeal from it to the county court superseded it, and the new trial in the county court put an end to it, so that it was no longer a claim in the plaintiff's favor. (*Id.*)

6. On an appeal from an order of the county court, in a cause originating in a justice's court, on a case and exceptions for a re-trial in the county court, which is granted by the county court, and thereupon an appeal is taken from this last order (or judgment) of the county court to the general term of the supreme court, where the order of the county court is reversed, the successful party is not entitled to any costs of the last appeal. It would make no difference that judgment was entered upon the order. (*Following the decision of the case of Woodbury agt. Morton, ante p. 56.*) (*Crosby agt. Brown, ante, 149.*)

7. On a motion for a new trial on the judge's minutes, no costs as for a motion can be allowed. The prevailing party is entitled only to a trial fee for the trial of an issue of fact. (*Muller agt. Higgins, ante, 224.*)

8. A trial fee of \$30 is taxable on the first and second trials each, where the jury disagreed on the first trial, but found a verdict for defendant on the second. (*Spring agt. Day, ante, 390.*)

9. A charge of \$15 for services after notice and before trial, not exceeding five term fees, is also taxable for each trial. (*Id.*)

10. Also a fee of 10 is properly allowed where more than two days were occupied at each trial, for such trials. (*Id.*)

11. A charge for stenographer's fees for copy minutes of the first trial is not allowable. (*Id.*)

12. Where the defendants in this case procured a settlement with the design to deprive the plaintiff's attorney of his costs, *held*, that they could not be permitted to have the benefit of a discontinuance or of a supplemental answer showing settlement without payment of the costs of the action up to the present time. (*Dietz agt. McCallum, ante, 493.*)

13. In an action of trespass in justice's

court, defendant pleaded title to a portion of the premises; that action was thereupon discontinued and one commenced in the Supreme Court, wherein the pleadings were substantially the same. Defendant succeeded on the issues affecting the premises as to which title was pleaded. Neither possession of nor title to the residue was made a question upon the trial by defendant, and the amount of the recovery for trespass thereon was less than fifty dollars.

Held, that under section 61 of the Code, the costs in such case are to be governed by the decision and judgment on the issue presented by the plea of title; that plaintiff, by claiming title to land not owned by him, caused all the costs which accrued in the Supreme Court; he, therefore, could not recover costs, but was properly chargeable with defendant's. (*Moss agt. Salisbury, 48 N.Y., 636.*)

14. Costs in an equity action are in the discretion of the court, and the exercise of this discretion cannot be reviewed. (*Taylor agt. Root, 48 N.Y., 687.*)

See CLOUD ON TITLE. (48 N. Y.)
JURISDICTION. (*Id.*)
See INFANTS (61 Barb.)
See DEMAND. (5 Lansing.)
INJUNCTION. (*Id.*)
PRACTICE. (*Id.*)

COUNTER CLAIM.

See Smith agt. Fox (*Mem.*). (48 N. Y.)
See STATUTE OF LIMITATIONS. (5 Lansing.)

COUNTY BOND.

See ACTION. (5 Lansing.)

COUNTY COURT.

1. A re-trial may be had in all cases brought into the county courts, by appeal, without reference to the form of the action, when the claim or claims for judgment made by the pleadings of either party shall exceed the sum of fifty dollars. (*Merrill agt. Pattison, ante, 289.*)

2. And also in actions for the recovery of specific personal property, where no claim or claims exceeding that amount may be made, provided the damages actually recovered, added to the assessed value of the property, shall exceed that sum. (*Id.*)

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3. The County Court has jurisdiction to order a receiver appointed by it, in proceedings supplementary to execution, to release to the debtor a judgment recovered by him for an unlawful seizure and sale of exempt property. (*Tillotson* agt. *Wolcott*, 48 N. Y., 188.)

See JUSTICES' COURT. (5 Lansing.)
PLEADING. (*Id.*)
PRACTICE. (*Id.*)

COUNTY JUDGE.

1. A county judge has power under the Code, to continue on the return of an order to show cause, an injunction order made by himself *ex parte* in an action in the supreme court. (*Hathaway* agt. *Warren*, ante, 161.)

2. (*This is adverse to Middletown* agt. *Rondout, &c.*, R. R. Co. at special term, 43 How., 144, affirmed at general term, 43 How., 481.) (*Id.*)

See MUNICIPAL CORPORATIONS. (61 Barb.)

3. The provision of the judiciary article of the constitution (art. 6, § 13), which limits the term of office of any judge to the last day of December next after he shall become seventy years of age, is not applicable to county judges elected before January 1st, 1870. (*People ex rel. Davis* agt. *Gardner*, 5 Lansing, 1.)

4. The defendant was appointed county judge in 1868, to fill a vacant term which expired December 31st, 1869; in November, 1869, was elected to the same office, and in February, 1870, attained the age of seventy years.

Held, that he was elected for four years from January 1st, 1870, and entitled to serve that full term, as being in office at the time of the adoption of the new judiciary article. (*Id.*)

See CONSTITUTIONAL LAW. (5 Lansing.)

RAILROAD MUNICIPAL BONDS.
(*Id.*)

COUNTY TREASURER.

See PUBLIC OFFICER. (5 Lansing.)

COUNTY TREASURER'S CERTIFICATE.

See ACTION. (5 Lansing.)

COURT OF APPEALS.

See AMENDMENT. (5 Lansing.)

COURT OF CHANCERY.

See DIVORCE. (62 Barb.)

COURTS OF SPECIAL SESSIONS.

See CONSTITUTIONAL LAW. (61 Barb.)
CRIMINAL LAW. (*Id.*)
STATUTES. (*Id.*)

COVENANTS.

1. Defendant accepted a deed of certain premises containing a clause that it was made subject to a mortgage, which the grantee therefore assumed and agreed to pay. The bonds accompanying the mortgage contained a condition that, in case of default, recourse must first be had to the lands mortgaged, and that the obligors would only be answerable for the deficiency. Held, that the mortgagee could maintain an action upon the implied covenant in defendant's deed, without first foreclosing the mortgage, and could recover the whole amount unpaid. (*Thorp* agt. *Keokuk Coal Co.*, 48 N. Y., 253.)

2. In an action to recover a rent charge reserved by the grantor and covenanted to be paid by the grantee in a conveyance in fee, seizing in the grantor is well established, so far as one holding under the grantee is concerned, by the fact that the grantee entered in allegiance to the grantor's title, out of which the rent is reserved; and, until something is shown to the contrary, the relations created by the covenants in the deed are presumed to have continued. Unless, therefore, some one bound by the covenant to pay the rent has paid it, or has been released therefrom, the action is well brought, and the production and proof of the covenant, in the absence of proof of payment or release, entitles the grantor or his assignee to a finding that the rent for twenty years (if the covenant has been so long executed) remains unpaid, and to a judgment therefor. The law presumes payment prior to that time, but no presumption arises from the absence of proof of such payment, that the rents have been extinguished, and the grantee and assignee released from the covenant. (*Central Bank* agt. *Heydorn*, 48 N. Y., 260.)

3. Even proof of non-payment of rent for a period of sixty-three years would not raise a presumption of such release of sufficient strength to establish the fact conclusively as a proposition of law, when the covenant sued upon re-

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mains in the possession of plaintiff, uncanceled, and is produced and read in evidence. (*Livingston agt. Livingston, Id.*, 4 J. Ch., 204, distinguished.)

See DEEDS. (48 N. Y.)

COVENANT OF WARRANTY. (5 *Lansing*.)

DAMAGES. (*Id.*)

INSURANCE. (*Id.*)

REPLEVIN. (*Id.*)

COVENANT OF QUIET ENJOYMENT.

See COVENANT OF WARRANTY. (5 *Lansing*.)

COVENANT OF WARRANTY.

1. A grantor's covenant to warrant and defend against himself, "and every person claiming or to claim the premises, or any part thereof," extends to possession as well as title; and whenever there is a disturbance of either, under title paramount, the covenant is broken. (Per MILLER, J.) (*Rea agt. Minkler*, 5 *Lansing*, 196.)
2. Such warranty includes all outstanding adverse claims to the premises, or any part thereof, which affect the full enjoyment of the possession or title. (*Id.*)
3. And held, that the existence and use of a private right of way over the granted premises, to which they were subject at the time of a conveyance with such a covenant, was a breach of the warranty. (*Id.*)

CREDITOR'S SUIT.

1. It seems a judgment creditor after instituting supplementary proceedings upon his judgment, and before appointment of a receiver, may bring an action in the nature of a creditor's bill to set aside an assignment of property. (*Bennett agt. McGuire*, 5 *Lansing*, 183.)

See EQUITABLE RELIEF. (5 *Lansing*.)
JUDGMENT DEBTOR, &C. (*Id.*)

CREDIBILITY.

See WITNESS. (5 *Lansing*.)

CREEK.

See BRIDGE. (5 *Lansing*.)

CRIMINAL ARREST.

See ARREST. (5 *Lansing*.)

CRIMINAL COMPLAINT.

See JURISDICTION. (5 *Lansing*.)

ARREST. (*Id.*)

INDICTMENT. (*Id.*)

CRIMINAL LAW.

1. Where the indictment against the defendant charged him in eleven distinct counts with misconduct in having audited, and aided in auditing, certain town accounts against the town of Castleton, Richmond county, while the defendant was supervisor thereof:

Held, that although the accounts, which the defendant aided in auditing, were described in the indictment as "unjustly illegal," "pretended and extortionate," it nowhere, in any count, averred the particular fact or facts which would make the accounts "unjust, illegal, pretended or extortionate." Such an omission is fatal to the indictment. (*The People agt. The Town Auditors of Castleton*, ante, 238.)

2. An indictment taken at the sessions must, in the caption, state that the grand jurors were then and there sworn and charged—this caption should be affixed by the clerk in case it is removed from the sessions to the *oyer and terminer*—without such caption it will be held bad. (*Id.*)
3. And where, pending the litigation in such action, it is apparent that such irregularities exist, and the defendants (the city) apply to and procure an act to be passed by the legislature, by which the assessment is hereby confirmed and declared to be of the same force and effect as if no informality or error had occurred in the making of said assessment, and the amount assessed shall be a lien on the property assessed:
4. The act of 1870 (*ch.*, 383), known as the (New York) City Tax Levy Laws, providing and authorizing the court of special sessions of that city to be held by less than two police justices, is unconstitutional and void. (*Huber agt. The People*, ante, 375.)
5. Therefore, all criminals convicted and sentenced in that court by one justice are entitled to be discharged. (*Id.*)
6. In an indictment for perjury charged to have been committed on the trial of a cause before the court or an officer thereof, it is essential, first, that the name of the court should be stated, and that such court should have a legal existence; second, that the offense should

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- be charged to have been committed in the county in which the indictment was found; and, third, that it should appear on the face, or be alleged in the body, of the indictment, that the evidence on which the assignment of perjury is based was material to the determination of the issue, or at least proper to be offered on the trial of such issue. (*Guston* agt. *The People*, 61 Barb., 35.)
7. Where an indictment alleged that the action, upon the trial of which the perjury was charged to have been committed, was pending in the "Supreme Court of the city of New York," and that the referee who administered the oath was appointed by the "Supreme Court of the city and county of New York;" *Held*, that the indictment was faulty in matter of substance. (*Id.*)
 8. So, where it nowhere appeared, in the indictment, that the offense, if any, was committed within the city and county of New York. (*Id.*)
 9. Where it was alleged, in the indictment, "that it then became and was a material issue to be tried before W. C. T. whether the said J. G. had committed adultery, as alleged by the plaintiff in the said action," but it was nowhere alleged that the evidence adduced, or the questions calling out that evidence, were material to the determination of that issue, no information being given as to what was "alleged by the plaintiff in the said action;" *Held*, that the indictment was fatally defective. (*Id.*)
 10. Upon an indictment for murder, the jury, under the statute, (2 R. S. 725, § 2, *Edm. ed.*) may convict the prisoner of any degree of the offense inferior to that charged. (*McNevin* agt. *The People*, 61 Barb., 307.)
 11. Upon the trial of such an indictment, the judge refused the request of the prisoner's counsel to charge "that they could convict of murder in the first degree, or murder in the second degree, or of any degrees of manslaughter," and in his charge restricted the jury in the event of any conviction, to murder in the first degree, or manslaughter in the third degree. *Held*, that unless there was an entire absence of evidence to prove the commission of any other crime than murder in the first degree or manslaughter in the third degree, it was error to charge as the judge did charge, and to refuse to charge as requested. (*Id.*)
 12. *Held*, also, that the right rule would have been for the judge to say to the jury that, under the indictment, a conviction of the principal offense, or of any less degree, was allowable, and then leave it to the jury to apply the facts to the definitions of the various grades of the crime, and say which they thought was sustained. (*Id.*)
 13. Where, upon the testimony, the jury could have convicted the prisoner, had they thought proper, of manslaughter in the 4th degree; *Held*, that a charge which in effect told them that they could not do so, and that if the prisoner was guilty at all, the lowest degree of crime of which they could convict was manslaughter in the third degree, was erroneous, to the prejudice of the prisoner. (*Id.*)
 14. A person convicted in this State, of the crime of petit larceny, as a first offense, is not convicted of a felony, but of some offense other than a felony. (*The People ex rel Stetzer* agt. *Bawson*, 61 Barb.)
 15. It was the intention of the legislature, in enacting the provisions of the Revised Statutes, to reduce the offense of petit larceny, as a first offense, to the grade of a misdemeanor. And practically, for all the general purposes of the prevention and punishment of crime, the offense has been deprived of its rank among felonies, and reduced to the lower grade, of misdemeanors. (*Id.*)
 16. Where the record of a conviction by one justice only, showed that the other justice was "absent through disability;" *Held*, that this was the statement of a fact. That that fact was jurisdictional, and, if untrue, might have been controverted; it being well settled that "no court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of the facts on which jurisdiction depends." (*The People* agt. *Davis*, 61 Barb., 456.)
 17. Under the act of April 26, 1870, a conviction before a single justice of the court of special sessions of the city and county of New York, is valid, where the record alleges that the other justice was "absent through disability," and that fact is not controverted. (*Id.*)
 18. Upon a review of a judgment of the court of general sessions of New York, upon writ of error, even though there was no request to charge, or exception taken, the court ought, under the statute, (*Laws of 1855, ch. 337, § 3*.) if it discovers any error which may have

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prejudiced the prisoner, to give him the benefit of it. (*McNevin* agt. *The People*, 61 Barb., 307.)

19. In order to give the court jurisdiction to try an offense committed on board a boat upon a canal, or in respect to the cargo or lading of such boat, it is necessary, under title 4, chapter 2, part 4 of the Revised Statutes (2 R. S. 727, §44.) as amended by chapter 431 of the Laws of 1860, that it should be alleged in the indictment that the offense was committed "on board the boat or vessel," and that the boat or vessel, on that trip or voyage, had passed through some part of the county where the indictment was found; and also to prove both facts, upon the trial. (*Larkin* agt. *The People*, 61 Barb., 226.)

20. Although the statute gives to courts of oyer and terminer power to deliver the jails, accordingly to law, of all prisoners, this refers only to cases of crimes; those courts being solely courts of criminal jurisdiction. (*The People ex rel. Hewlett* agt. *Brennan*, 61 Barb., 540.)

21. A warrant of commitment, in a criminal case, directed to a proper officer, commanding him to convey and deliver the prisoner to the "keeper" of the prison where he is to be imprisoned, and requiring the keeper to safely keep the prisoner until the expiration of a specified period, and until he shall pay a fine therein mentioned, or be discharged by due course of law, is in all respects in the proper form. (*The People ex rel. Stetzer* agt. *Ransom*, 61 Barb., 619.)

22. It is no objection to a warrant of commitment upon a conviction before a court of special sessions, that it is not issued immediately. So long as the case remains before the court, not removed in any manner, such court does not lose jurisdiction to issue the warrant, by lapse of time. (*Id.*)

23. No seal is necessary, to a warrant of commitment. The statute only provides that it shall be "under the hand" of the magistrate. (*Id.*)

See STATUTES. (61 Barb.)

24. To sustain an indictment for obtaining the signature of an individual to promissory notes given for the price of property sold to him, by false pretences, the pretences alleged to be false must be shown to be of some existing fact, and made for the purpose of inducing the purchaser to execute the notes. (*Scott* agt. *the People*, 62 Barb., 62.)

25. Both the indictment and the fraudu-

lent purpose are facts to be proved, and are not to be presumed. (*Id.*)

26. An indictment for obtaining the signature of a purchaser to promissory notes given for the purchase price of property sold to him, by false pretenses and representations as to the price asked for the property by a third person, who was the owner, cannot be sustained, where the proof shows that no representations were made by the defendant, in regard to the price, except that he told the purchaser, in the course of the negotiations, that he did not think the seller would take less than a sum named; and that the only representations as to price, at the time of the sale and purchase, were made by the seller. *MULLIN*, P. J., dissented. (*Id.*)

27. Although the price asked, and finally agreed to be paid by the purchaser, be fixed by collusion between the owner of the property and the defendant, for the purpose of defrauding the purchaser, such collusion, although it may be an indictable offense, is not the offense charged. (*Id.*)

CRIMINAL TRIAL.

See CRIMINAL LAW. (5 Lansing.)
INDICTMENT. (*Id.*)

CROSSWALKS.

See MUNICIPAL CORPORATIONS. (5 Lansing.)

D.

DAMAGES.

1. After a conversion of property the title still remains in the owner, and the property can be taken from the wrong doer upon an execution against the owner in favor of a third person, sold, and the proceeds applied upon the owner's debt. In such case the wrong-doer can set up the seizure and sale in mitigation of damages. It is not the seizure which gives the defense, but that the property has been seized under such circumstances that the owner has had or could have the benefit of it. (*Ball* agt. *Loney*, 48 N. Y., 6.)

See BANKS AND BANKING. (48 N. Y.)
BILLS. NOTES. CHECKS. (*Id.*)
LEASE. (*Id.*)
Krom agt. *Lery* (Mem.). (*Id.*)

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2. In actions for a breach of warranty on a sale of goods, the measure of damages is, the difference between the value of the goods if they had corresponded with the warranty, and their actual value. (*Wells agt. Selwood*, 61 Barb., 238.)

3. Upon the breach, by the purchaser, of a contract to take the property sold to him, and to pay a stipulated price therefor, the measure of damages is the difference between the contract price and the value of the property at the time of the breach. (*Hewitt agt. Miller*, 61 Barb., 567.)

See ACTION. (62 Barb.)

ASSAULT AND BATTERY.

GRANT. (62 Barb.)

NEGLIGENCE. (62 Barb.)

4. In an action for unlawfully taking and carrying away the plaintiff's goods, it appeared that the defendant, having induced the plaintiff's wife to leave him, had aided her in carrying away clandestinely certain articles of property belonging to the plaintiff; that the wife afterward brought the property to the vicinity of the plaintiff's residence, and delivered to him railroad checks for it, which the plaintiff, with knowledge of the identity of the property, upon request of a station agent that it should be removed, delivered to a third person, directing him to take charge of it, and the latter did so. The wife did not return, or offer to return, to her husband.

Held, that there was an acceptance of the property and exercise of ownership over it by the plaintiff for himself, after the wrongful taking, and an allowance of damages for its full value was error. (*Duiley agt. Crowley*, 5 Lansing, 301.)

5. A warranty of a steam-engine as having a certain capacity for work, as sound and in good order, and as having the ability to perform labor to the extent of the capacity warranted, is a general warranty, and the damages allowed for its breach are merely the difference between the actual value of the engine and that which it would have had if as warranted. (*Edwards agt. Collson*, 5 Lansing, 324.)

6. An injured party is restricted in the recovery of damages, for acts not intentionally committed and breaches of contract, to such as result naturally and necessarily from the act complained of. And the rule is applicable in all cases, except in those where, for great ends of public justice, punitive damages may also be awarded.

(*People agt. Mayor, &c., of Albany*, 5 Lansing, 524.)

7. Damages caused to property from the bursting of a street sewer in New York city, through its imperfect and insufficient construction, may be recovered in an action against the city. (*Leventhal agt. Mayor, &c., of N. Y.*, 5 Lansing, 532.)

See EVIDENCE. (5 Lansing.)

INJUNCTION. (*Id.*)

NEGLIGENCE.

PARENT AND CHILD. (*Id.*)

PARTNERSHIP. (*Id.*)

DEBTOR AND CREDITOR.

1. To entitle a judgment creditor to attack a disposition made of the debtor's property, he must be able to show that the disposition was such that something remains of it or its proceeds, which ought to be applied upon his judgment. Where, therefore, one received from the debtor's wife the avails of his property in her hands with intent to defraud a creditor, with an agreement to retain or use it as the debtor and wife might want, but, before recovery of judgment for the debt by the creditor, he has returned it or paid it out as directed by the debtor, and has settled with them and been discharged from all claim by the latter, he is not liable to the judgment creditor therefor. (*Cramer agt. Blood*, 48 N. Y., 684.)

See JUDGMENTS. (48 N. Y.)

2. Where, at the time an assignment of property in trust for the benefit of creditors was executed, one of the assignors was an infant of the age of nineteen years, only: *Held*, that that fact alone rendered the assignment void, as matter of law, as against creditors; upon the ground that an infant having a right to disaffirm his contracts, an assignment by him does not, and cannot, as matter of law, devote the property assigned, absolutely and unconditionally to the payment of his debts. (*Yates agt. Lyon*, 61 Barb., 205.)

3. In an action by judgment creditors to set aside an assignment made by partners, and to reach the joint property, it is not a ground for the dismissal of the complaint, or for a nonsuit, that one of the assignors, though named as a party in the summons and in the action, has not been served with process, nor appeared in the action. (*Id.*)

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DECLARATIONS.

See EVIDENCE. (61 Barb.)
EVIDENCE. (62 Barb.)
GIFT. (62 Barb.)

DECREE.

See GIFT. (5 Lansing.)
JUDGMENT DEBTOR, &c.
PRACTICE. (Id.)

DEEDS.

1. When one purchases land, and at his request the same is deeded to another, although the purchaser receives and retains the deed without disclosing the existence thereof to the grantee, and takes and retains possession of the land, yet by the deed the title passes and becomes vested in the grantee, and under the prohibitions of the statute of uses and trusts (1 R. S., 728, §51) no trust results in favor of the purchaser. (Everett agt. Everett, 48 N. Y., 218)
 2. The grantee in a simple quitclaim deed, in the absence of fraud or mistake, has no remedy for a failure of title against his grantor, nor has he any defense to an action for the consideration on the ground of failure thereof. (Thorp agt. Keokuk Coal Co., 48 N. Y., 253.)
 3. Where a deed is introduced in evidence by one who is a stranger thereto, to prove as against a subsequent grantee an admission by the parties to the conveyance, the grantee is not estopped from proving that the provision relied upon was inserted in the deed by mistake. (Pope agt. O'Hara, 48 N. Y., 446.)
- See CLOUD ON TITLE. (48 N. Y.)
CONSTRUCTIVE NOTICE. (Id.)
CONTRACTS. (Id.)
COVENANT. (Id.)
Schott agt. Schwartz (Mem.). (48 N. Y., 666)
4. Where a deed, executed by husband and wife, is set aside because of the husband's unsoundness of mind, no deductions can be made on account of the value of the wife's right of dower, nor for taxes and assessments paid since the execution of the deed. (Marvin agt. Lewis, 61 Barb., 49.)
 5. Such a deed passes nothing; and the wife could not convey her inchoate right of dower. She could only release it to some one having the legal estate in the land. (Id.)

6. A deed being void, the heir of the grantor may recover the land attempted to be conveyed. And the court, in declaring such deed void in law, cannot impose, as a condition, that it shall be treated as good, so far as to require the plaintiff to repay what has been paid, by the occupant, for taxes and assessments. (Id.)

7. The fact that a deed recites a money consideration, as paid to the grantor, does not prevent a party from proving that no consideration was paid, to establish the fact that the land was conveyed as an advancement. (Sanford agt. Sanford, 61 Barb., 293.)

See EJECTMENT. (61 Barb.)
EVIDENCE. (61 Barb.)
GRANT.
VENDOR AND PURCHASER. (62 Barb.)
COVENANT OF WARRANTY. (5 Lansing.)
EJECTMENT. (Id.)
MISTAKE. (Id.)

DEFAULT.

1. Where it became the duty of the appellant's attorneys to see that the cause was restored to the calendar of the general term, as part of the conditions upon which they were relieved from a former default—which they did not do; and the respondent's attorney in accordance with that order, finding it omitted from the calendar on the 1st day of the October general term, procured it to be restored, and some days afterwards it was regularly called to a judgment of affirmance by default:

Held that this action was regular, and in consideration of this being a second motion by the appellants to be relieved, it was proper that the court look into the merits presented by the justice's return.

Held, also, that the testimony in the court below warranted the justice, notwithstanding the form of the note, to find that the note was indorsed by the appellants for the accommodation of McKenzie, one of the defendants, and for the purpose of enabling him to procure a release of his wagon from the plaintiffs' lien. Under such circumstances their liability as accommodation indorsers is well established by the court of appeals in *Minre agt. Cross*, (19 N. Y., 227.) (Luft agt. Graham, ante, 152.)

DEFENSES.

See DEEDS. (48 N. Y.)

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EXECUTOR AND ADMINISTRATOR.
(*Id.*)MISTAKE. (*Id.*)SUPPLEMENTARY PROCEEDINGS
(*Id.*)*Schott* agt. *Schwartz* (*Mem.*) (48 N. Y., 666)CANAL CONTRACTOR. (5 *Lansing.*)DAMAGES. (*Id.*)DEMAND. (*Id.*)INJUNCTION. (*Id.*)PLEADING. (*Id.*)

DELIVERY.

See CLOUD ON TITLE. (48 N. Y.)SALES. (*Id.*)*Gibbs* agt. *Van Buren* (*Mem.*) (48 N. Y., 661.)GIFT. (62 *Barb.*)

GOODS SOLD AND DELIVERED.

VENDOR AND PURCHASER. (62 *Barb.*)CARRIER. (5 *Lansing.*)FRAUDS STATUTE OF, (*Id.*)GIFT (*Id.*)INSURANCE. (*Id.*)STATUTE OF FRAUDS. (*Id.*)

DEMAND.

See CONVESSION. (48 N. Y.)

1. The rule under which commencement of a suit on a promissory note, payable at a particular time and place, is a sufficient demand of payment, and the readiness of the payee a matter affecting the question of costs, is applicable to contracts to pay for goods at a time and place agreed. (*Locklin* agt. *Moore*, 5 *Lansing*, 307.)

See REPLEVIN. (5 *Lansing.*)

DEMURRAGE.

1. Where there is no express agreement for demurrage, damages in the nature of demurrage may be recovered against the owner of the cargo when he improperly detains the vessel beyond a reasonable time for loading or unloading. (*Id.*)
2. Detention of a vessel, while waiting her turn to load or unload, is not such a detention for which the owner of the cargo is liable. (*Id.*)
3. Where an order for the sale and delivery of a quantity of coal was sealed up and delivered to the owner of a vessel to be taken to the coal company for the purchaser of the cargo without any specific knowledge of the owner of the vessel of what it contained, the conversation had at the time by the owner of

the vessel with the agent for the coal company, as to the bargain respecting the coal, was properly received in evidence as the order introduced in evidence, and claimed to be the written contract, was not intended to embrace the whole contract, but was given in pursuance of part of it, and contained no more of it than was necessary to enable the coal company to know how much coal to deliver, and for whom, and the amount which it should advance. (*Id.*)

See PLEADING. (5 *Lansing.*)

DIVORCE.

1. Where in an action for divorce, brought by the husband against the wife for adultery, it is proven that such act of adultery was in fact committed by the wife on a certain day, and it was also shown that subsequently the husband condoned such act of the wife by voluntary cohabitation, and for that cause his complaint was dismissed.

Held, that the fact of the commission of such adultery was no bar to a subsequent action by the wife for the recovery of her inchoate right of dower in her husband's real estate. (*Pitts* agt. *Pitts*, ante, 64.)

2. It is not adultery, which, of itself, can bar dower. It must be followed by a conviction in a suit for divorce by the husband, and such a conviction must be established by the final decree or judgment in the action. (*See* 2 R. S. 146, § 48.) (*Id.*)
3. The statutory provisions on the subject of dower, confines the effect of adultery by the wife, in barring her claim for dower, to cases in which such adultery is established by a judgment of the court. (*Pitts* agt. *Pitts*, ante, 300.)
4. The effect of condonation restores the wife's right to dower, even if forfeited by the adultery, and if such fact is found in the divorce suit, the previous adultery works no forfeiture. (*Affirming S. C. at special term ante p. 64.*) (*Id.*)
5. This court, at general term, can not only entertain an appeal from an order granting alimony, but may order a reference to ascertain a suitable amount to be allowed. (*Galing* agt. *Galing*, 61 *Barb.*, 31.)
6. A decree for divorce should not direct the payment by the defendant of arrears of alimony. The plaintiff should be left to enforce the payment of the alimony previously ordered, in the usual way. (*Id.*)

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3. Where the defendant's property over and above the debts owing by him, amounted to but \$12,550: *Held*, that alimony to the amount of \$600 annually was full as much as should have been allowed to the plaintiff. (*Id.*)

6. The former court of chancery, in this State, had no jurisdiction to grant divorces, independent of the statutes on that subject. (*Crain* agt. *Cavana*, 62 Barb., 109.)

7. And the provisions of the Revised Statutes relating to separation and limited divorces, do not authorize the court, by the decree in a suit for separation *a mensa et thoro*, to allow a gross sum to the wife for her support, and direct it to be paid by the husband in lieu of her dower and distributive share in his estate. (*Id.*)

8. Such a provision in the decree being void, the wife's right of dower in her husband's estate after his death, is unaffected by it. (*Id.*)

9. The statute does not, in terms, authorize the court to make any decree affecting the right of dower. The legislature contemplated a reconciliation of the parties as probable; hence the provision it authorizes to be made for the wife is a temporary one. (*Id.*)

10. The foundation of the rule which forbids the granting a decree of divorce on the unsupported confessions of a party, is the fear of collusion and imposition on the court. When, however, the reason of the rule fails, the rule itself ceases. Hence, when the confessions are made under circumstances which entirely preclude suspicion of collusion, or imposition, the confessions will be received, and a decree granted thereon, without other evidence. (*Lyon* agt. *Lyon*, 62 Barb., 138.)

DESERTER.

See INSPECTORS OF ELECTION. (5 Lansing.)

DETERMINATION OF CLAIMS TO REAL PROPERTY.

1. An action to compel the determination of claims to real property is within the jurisdiction of the Supreme Court, and in such action it is its duty to determine the questions as to whether the plaintiff is entitled to the relief sought, and whether the relief should be sought in an action, or in proceedings under the Revised Statutes. An error in deciding these questions does

not affect the question of jurisdiction, and the decision of the court thereon cannot be reviewed collaterally. (*Fisher* agt. *Hepburn*, 48 N. Y., 41.)

2. Whether the proceedings to determine the title to real property are by action or special proceedings, the court has jurisdiction over the question of extra allowance of costs, and the decision cannot be set aside upon motion. (*Id.*)

DEVISE.

See WILLS. (48 N. Y.)
Mugaw agt. *Field* (Mem.), 48 N. Y., 866.

ACCUMULATION. (5 Lansing.)

DEWISEE.

See DEVISE. (5 Lansing.)

DIRECTORY STATUTE.

See MUNICIPAL CORPORATION. (5 Lansing.)

DISCONTINUANCE.

See TRUSTS AND TRUSTEES. (48 N. Y.)

DISCRETIONARY POWERS.

See ASSESSMENTS. (5 Lansing.)

DISCRETION.

See JUSTICE OF THE PEACE. (5 Lansing.)

MUNICIPAL CORPORATION. (*Id.*)
PRACTICE. (*Id.*)

DISORDERLY PERSON.

See JURISDICTION. (5 Lansing.)

DISQUALIFICATION OF WITNESS.

See WITNESS. (5 Lansing.)

DONOR AND DONEE.

See GIFT. (5 Lansing.)

DOWER.

1. Where in an action for divorce, brought by the husband against the wife for adultery, it is proven that such act of adultery was in fact committed by the wife on a certain day, and it was also shown that subsequently the husband condoned such act of the wife by voluntary cohabitation, and for that cause his complaint was dismissed.

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Held, that the fact of the commission of such adultery was no bar to a subsequent action by the wife for the recovery of her inchoate right of dower in her husband's real estate. (*Pitts* agt. *Pitts*, ante, 64.)

2. It is not adultery, which, of itself, can bar dower. It must be followed by a conviction in a suit for divorce by the husband, and such a conviction must be established by the final decree or judgment in the action. (*See* 2 *R. S.* 146, § 48.) (*Id.*)

3. The statutory provisions on the subject of dower, confines the effect of adultery by the wife, in barring her claim for dower, to cases in which such adultery is established by a judgment of the court. (*Pitts* agt. *Pitts*, ante, 300.)

4. The effect of condonation restores the wife's right to dower, even if forfeited by the adultery, and if such fact is found in the divorce suit, the previous adultery works no forfeiture. (*Affirming S. C. at special term ante* p. 64.) (*Id.*)

See DEED. (61 *Barb.*)

DIVORCE. (62 *Barb.*)

EVIDENCE. (5 *Lansing.*)

FORECLOSURE. (*Id.*)

DRAFT.

See BILLS OF EXCHANGE. (61 *Barb.*)

E.

EARNEST MONEY.

See FRAUDS, STATUTE OF. (5 *Lansing.*)

EASEMENT.

1. S., being the owner of a block of stores numbered 1, 2, 3 and 4, respectively, constructed a railway transversely through the cellars of Nos. 1, 2 and 3 for the benefit of No. 4. He sold and conveyed to different purchasers Nos. 1, 2 and 3, reserving in the deed the railway and the right to himself and assigns to pass and repass at pleasure. Subsequently the owners of Nos. 1, 2 and 3, being desirous of extinguishing the right of way and closing up the openings for the railway, purchased No. 4. In the deed thereof S. relinquished to the grantees all his right and title to the railway, and thereupon the owner of No. 2 built a solid stone wall between it and No. 3, without objection from the owner of the latter. The owner of

No. 3, having subsequently become owner of No. 4, claimed the right of way, upon the ground that the agreement to extinguish it was by parol and therefore void. *Held*, that the right of way, having been created by deed, was not extinguished by non-user, and that it was a freehold interest, but that the parol agreement, having been partially performed, was valid and operative as an equitable estoppel to extinguish the right of way. (*Pope* agt. *O'Hara*, 48 *N. Y.*, 446.)

See SPRINGS. (61 *Barb.*)

PRESCRIPTION. (5 *Lansing.*)

EJECTMENT.

6. To establish a right to recover possession of real estate, as against a person claiming under a title shown to be invalid, possession and use by the plaintiff, even without proof of paper title, and ouster by the defendant, are sufficient. (*Hopkins* agt. *Mason*, 61 *Barb.*, 469.)

See PARTIES. (62 *Barb.*)

AUCTION SALE. (5 *Lansing.*)

ELECTION.

See CORPORATION. (61 *Barb.*)

INSPECTORS OF ELECTION. (5 *Lansing.*)

ELECTION OF REMEDIES.

1. The remedy by an action, for rents, by one tenant in common against another, is cumulative, and does not bar the equitable adjustment of them on a partition in equity. (*Scott* agt. *Guernsey*, 48 *N. Y.*, 106.)

EMINENT DOMAIN.

See STATUTES. (48 *N. Y.*)

EMPLOYER AND EMPLOYEE.

See EVIDENCE. (5 *Lansing.*)

MASTER AND SERVANT. (*Id.*)

ENCROACHMENT.

See MUNICIPAL CORPORATION. (5 *Lansing.*)

ENTRIES.

See EVIDENCE. (5 *Lansing.*)

ENLISTMENT.

See OFFICE AND OFFICER. (48 *N. Y.*)

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EQUITABLE ACTION.

See ALTERATION OF INSTRUMENT. (5 *Lansing*.)
 EQUITABLE RELIEF. (*Id.*)
 INSURANCE. (*Id.*)
 PRACTICE. (*Id.*)

EQUITABLE OWNER.

See ATTORNEY. (62 *Barb.*)

EQUITABLE RELIEF.

1. A mortgage void between the parties may be removed, in equity, as an obstruction to the collection of a judgment recovered after execution of the mortgage, but for debt incurred prior to such execution. (*Stowell agt. Haslett*, 5 *Lansing*, 380.)

EQUITY.

1. A party coming into a court of equity, and asking relief upon the ground of mistake, must show that he has used due diligence and good faith to avoid the consequences of the mistake. He cannot obtain relief where his delay and omission of duty has caused irreparable mischief to the other party. (*Thomas agt. Bartow*, 48 *N. Y.*, 193.)
2. Where there is a mistake, whether of law or of fact, in reducing an agreement to form or in carrying it into effect, equity will grant relief; but where the parties adopt the security which is to be used to effectuate their intention, if the security should fail, from ignorance of the law or from any other cause, to operate as the parties intended, the courts cannot substitute any other security for the one adopted. (*Lanning agt. Carpenter*, 48 *N. Y.*, 408.)

See CONTRACTS. (48 *N. Y.*)
 MISTAKE. (*Id.*)

See MUNICIPAL CORPORATIONS. (61 *Barb.*)

ERASURE.

See FORGERY. (5 *Lansing*.)

ERROR OF FACT.

See PRACTICE. (5 *Lansing*.)

ESTATE IN LANDS.

See DEVISE. (5 *Lansing*.)

ESTATE OF INHERITANCE.

See DEVISE. (5 *Lansing*.)

ESTOPPEL

1. W. C. S. and M. B. S. were each the owner of premises formerly united, which were subject to a mortgage, of which, upon partition, each had assumed and agreed to pay the one-half. W. C. S. paid his portion; M. B. S. conveyed to R., subject to one-half the mortgage, which R. assumed. R. was ignorant of the fact that W. C. S. had paid more than his proportion of the payments already made, and understood and believed he was assuming but the one-half remaining unpaid, and he was allowed but that deduction from the purchase price. W. C. S., who was to receive a benefit from the sale, was present at the execution of the conveyance, knew R. was taking it with such understanding and belief, and did not inform him of the real facts. In action brought to foreclose the mortgage: *Held*, that the rights and equities of the parties interested in the equity of redemption could properly be litigated and adjusted as between themselves; that W. C. S. was estopped from claiming the exclusive benefits of the payments made by him before R.'s purchase, and that the balance due at the date of the purchase was chargeable equally upon the two parcels of land. (*Erie Co. Savings Bank agt. Roop*, 48 *N. Y.*, 292.)
 2. Where a deed is introduced in evidence by one who is a stranger thereto, to prove as against a subsequent grantee an admission by the parties to the conveyance, the grantee is not estopped from proving that the provision relied upon was inserted in the deed by mistake. (*Pope agt. O'Hara*, 48 *N. Y.*, 446.)
- See EASEMENT. (48 *N. Y.*)
 JUDGMENT. (*Id.*)
 TELEGRAPH COMPANIES. (*Id.*)
Hadden agt. Dimick (*Mem.*) (*Id.*, 661.)
3. The principle that when a person has induced another to act upon his statements or admissions, made for that purpose, he is concluded from asserting the truth, against such statements and admissions, has been often applied in actions relating to real property. (*Per BOCKES, J.*) (*Finnegan agt. Carahar*, 61 *Barb.*, 252.)
 4. In an action of ejectment it appeared in evidence that the defendant, at the time the summons and complaint were served upon him, being then upon the premises, told the person serving the papers, in substance, that he lived in or was in possession of the house, and

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service was made upon the faith of that statement: *Held*, that the defendant was estopped from denying that he was in actual occupation at the commencement of the action. (*Id.*)

1. E. subscribed for twenty shares of the defendant's stock, of \$100 per share, paid ten per cent. down and agreed to pay the balance on call of the directors. Several calls upon E. were made, and payments made by him pursuant thereto to the amount of \$1,000. Other calls not being met by E., a suit was commenced against him by defendants, for recovery of the balance due, and as to all but the installment due under a last call of \$200, he sustained the defense of the statute of limitations. A judgment was recovered by defendant for the balance due under the last call, which was collected from E. by execution; afterward the defendant passed a resolution forfeiting all shares of stock upon which any amount remained unpaid. The plaintiff having been appointed receiver of E.'s property, used in this action to compel the issue to him, as such, of the shares of stock subscribed for by E., demand therefore having been made of the defendant and delivery refused.

Held (MILLER, P. J. dissenting), that the defendant was not estopped by the judgment recovered against E. and payment thereof, from setting up as a defense in this action the non-payment for and forfeiture of such shares. (*Johnson* agt. *Albany and Susquehanna R. R. Co.*, 5 *Lansing*, 222.)

See PRINCIPAL AND AGENT. (62 *Barb.*)
See AUCTION SALE. (5 *Lansing*.)
LIEN. (*Id.*)
FRAUDS STATUTE OF. (*Id.*)

EVICTION.

See COVENANT OF WARRANTY. (5 *Lansing*.)

EVIDENCE.

1. Where the plaintiffs previous to commencing their action against the defendant, a telegraph company, for damages in consequence of a negligent failure to send their message in time, write a letter to the defendant giving a detailed statement of their version of the facts upon which they claim damages, and such letter is not answered by the defendant, but is detained by it, without any answer, it is not admissible on the trial as evidence for the plaintiffs. (*Waring* agt. *United States Telegraph Company*, ante, 69.)

2. It would be preposterous to hold that all the facts stated in such a letter were admitted by the corporation, because the president, secretary, or some officer of the company, on an application for compensation for alleged damages, did not by letter deny the truth of them. (*Id.*)

3. Inference from a party preserving a silence is considered a very dangerous kind of evidence, and is to be kept within very strict limits. (*Id.*)

4. In an action against the owners of a pier for personal injuries, resulting in death, it might be conceded that if the pier was in an unsafe condition at the time it was leased to lessees, some fourteen months prior to the accident, the lessees then being in possession, would not afford a defense against a claim upon the owners for such injuries, arising from such defect, and where there was no direct evidence as to the condition of the timbers at the time of giving of the lease, but it was assumed by the judge at the trial that it might be inferred from general knowledge of the length of time required for wood to become rotten, but in this case it could not occur in the time intervening between the making of the lease and the happening of the accident; and the only evidence upon the subject was that it would require the lapse of fifteen years before such timbers would become so rotten:

Held, that it was impossible that the conclusion reached by the jury, in finding for plaintiff, could be sustained by such evidence and that the court erred in submitting the inquiry which he did to the jury. (*Storrs* agt. *Edgar*, ante, 139.)

6. Where a disputed question of fact has been fully submitted to the jury, their verdict thereon cannot be disturbed upon any opinion which may be entertained by the court on a review, as to which way the conflict should have been decided. (*Head* agt. *Smith*, ante, 476.)

7. Where the plaintiff reads a portion of the defendant's answer to the jury as evidence to contradict the witnesses of the defendant, and the jury, notwithstanding, find the facts in accordance with the defendant's witnesses, the objection of the plaintiff that the defendant by his answer is estopped from setting up these facts, cannot prevail to disturb the verdict of the jury. (*Id.*)

Held, that the defense in this case, that the promissory note upon which the action was brought was procured by

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fraud, and that the plaintiff was not a *bona fide* holder for value without notice, could not be sustained. (*Id.*)

7. An entry was made upon the journal of a bank in the regular day's business, charging certain mortgages held by the bank to the president and principal stockholder, who was the mortgagor, against a credit to him of a larger amount appearing upon the books of the bank. The book-keeper, who made the entry, had no recollection of the transaction. The mortgages were subsequently transferred by the bank to a *bona fide* purchaser for their face. The president and the bank representing them to be wholly unsatisfied and valid liens. In an action by a subsequent incumbrancer to remove the liens of the mortgages: *Held*, that the entry alone, without some evidence of its adoption by the mortgagor and the bank, was not sufficient proof of the payment of the mortgages; and the subsequent action of both, in negotiating the mortgages, rebutted any inference of acquiescence or adoption. (*Whitehouse agt. Bank of Cooperstown*, 48 N. Y., 239.)
8. Where, in an action upon a written instrument, the issue is as to the genuineness of the signature thereto, other papers executed by defendant, the signatures to which are conceded to be genuine, but which are not properly in evidence for other purposes, cannot be received in evidence or submitted to the jury to enable them to compare the signatures, and thus draw a conclusion as to the genuineness of the one in question. (*Randolph agt. Loughlin*, 48 N. Y., 456.)
9. When the receipt given by an express company, upon receiving a package for transportation which contains the contract, is lost, but a sworn copy thereof is produced, an entry of the transaction made in the books of the company by the clerk receiving the package is not competent evidence for the purpose of showing what the contract was, nor is evidence of the custom of the company to make special entry in such cases of contracts of the nature of the one claimed, and that in the case at bar there was no such entry. (*Reed agt. U. S. Express Co.*, 48 N. Y., 462.)
10. Where the preliminary proof of loss and of comparison has been given to make a copy of a contract evidence, the copy is legally of as high an order of proof as would have been the original, and parol proof cannot be given

to weaken or alter the contract thus established. (*Id.*)

11. Plaintiff, as a witness for himself, was asked to state what notes he had guaranteed. He answered from a written memorandum furnished him by defendants. *Held*, that the question was proper, as it simply called for a description merely, not the contents of the notes, and that the memorandum as an admission of defendants, was proper evidence. (*Id.*)
 12. M., one of the defendants, as a witness for them, was asked to state whether, if the notes had been left for collection, they would have been placed to collection account; also, whether, if the money had been paid to the bank for the notes, he would have given a certificate of deposit. *Held*, that the question was purely hypothetical, and the evidence was properly excluded. (*Id.*)
 13. Where, in an action of trespass, defendant claims title to the *locus in quo* by adverse possession, the declarations of a former occupant under whom defendant claims are admissible as evidence, to characterize his possession as adverse to any title of the plaintiff; and this is competent under a general plea of title, without allegations that title is claimed by adverse possessions. (*Moss agt. Salisbury*, 48 N. Y., 636.)
- See CHATTEL MORTGAGE. (48 N. Y.)
 CONTRACTS. (*Id.*)
 DEED. (*Id.*)
 FORMER ADJUDICATION. (*Id.*)
 PLEADINGS. (*Id.*)
 SHIPPING. (*Id.*)
 STATUTES. (*Id.*)
 STEAMBOATS. (*Id.*)
 TRIAL. (*Id.*)
 TRUSTS AND TRUSTEES. (*Id.*)
Green agt. Plank (Mem.) (48 N. Y., 669.)
Baldwin agt. Bald (Mem.). (*Id.*, 673.)
Krom agt. Levy (Mem.). (*Id.*, 679.)
Waugh agt. Fielding (Mem.). (*Id.*, 681.)
14. A record book of protests, kept by a notary, is the best evidence of the entries therein; and if such entries are competent for any purpose, the book should be produced or shown to be lost, before parol evidence of the entries can be given. (*Genet agt. Lawyer*, 61 Barb., 211)
 15. Although the declarations of a grantor, accompanying the conveyance of real estate to his sons, or accompanying the giving of personal property to

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them, are competent evidence as *res gestæ*, on the question whether such real estate or personal property were advancements; yet such declarations are not admissible to contradict the plain terms and legal intendment of a writing governing the transaction. (*Sanford* agt. *Sanford*, 61 *Barb.*, 293.)

16. In an action wherein the plaintiff, one of the children, and the widow of a decedent, are interested on one side, and the devisees and executors are interested on the other side, the attorney by whom the will was drawn may be allowed to testify as to the making of an agreement between the testator and his wife, at the time the will was drawn, in regard to a bequest of \$10,000 to the widow, being in lieu of a proposed gift of a \$5,000 note; and as to what was said by and between the testator and his wife, and to the witness on that subject; and that the will was drawn in conformity with such agreement. (*Id.*)

17. Where the plaintiff is clearly entitled to recover, under the evidence, the only real question relating to the amount, the jury have a right to rely for that on the testimony of a witness calculating and stating it, where there is no contradiction of such testimony. (*Pitney* agt. *The Glens Falls Ins. Company*, 61 *Barb.*, 335.)

18. An oral agreement, connected with a contract in writing, may be proved by parol, if subsequent and independent. (*Smith* agt. *Holland*, 61 *Barb.*, 333.)

See PROMISSORY NOTES.
WITNESS.

19. Confessions are not, alone, sufficient to establish a charge of adultery. A sentence of divorce will not be given upon the sole confessions of the parties. (*Lyon* agt. *Lyon*, 62 *Barb.*, 138.)
20. Evidence, in order to corroborate, must relate to some portion of the evidence which is material to the issue. (*Id.*)
21. The general rule is, that the declaration of an agent, made in reference to the subject matter of the agency, while engaged in the business, bind the principal. (*Matteson* agt. *The New York Central Railroad Co.*, 62 *Barb.*, 964.)
22. The declarations of an agent of a railroad company, who was in charge of a gang of men employed in relaying ties, that there was sufficient time to relay them before the arrival of the next train, are admissible against the

company, being a part of the *res gestæ*. (*Id.*)

23. In action by husband and wife, against a railroad company, to recover damages for a personal injury to the wife, occasioned by the negligence of the defendant, statements of the wife, in regard to her health and condition, made to a physician called to prescribe for her, after the injury, may be received to show the symptoms for which he prescribed, and the disease, if any, under which she was then laboring. The jury has the right to know for what disease, or symptoms of disease and injury the physician prescribed, and for the evidence of which he relied, necessarily, on the patient's statements. (*Id.*)

24. It is competent, in an action to recover damages for personal injuries, for the plaintiff to show that the injuries were permanent—that she will not probably recover from the effects. (*Id.*)

25. A physician may be asked to give his opinion as to the cause of a spinal difficulty he has testified a patient was afflicted with. But in such a case he must state the facts on which his opinion is founded. (*Id.*)

26. A memorandum in the handwriting of a physician and surgeon, in an account book kept by him, of the time a child was born, at whose birth he attended, cannot be received as evidence of the time of the birth, after the death of the physician, unless it is sustained by proof of its truth. (*Matter of Paige*, 62 *Barb.*, 476.)

27. On an application to the Surrogate to revoke the probate of a will on the ground of the non-age of the testator, declarations of the testator as to what was his age are inadmissible. (*Id.*)

28. When a plaintiff's character for chastity is directly in issue upon the question of damages, it is incompetent to disparage it by proving specific acts of lewdness and immorality. (*Ford* agt. *Jones*, 62 *Barb.*, 484.)

29. In such a case it is error to rule that the plaintiff's character for chastity can be attacked only by proof of general reputation. (*Id.*)

30. If testimony apparently contradictory can be reconciled, if by any proper view it can all be made consistent, this is the duty of courts, as well as juries, to attempt. Its weight is never a question of law, for a court, except in cases where it cannot be so recon-

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ciled and explained. (Warren agt. Haight, 62 Barb., 490.)

31. When incompetent evidence has been received, it is the duty of the party offering it to show that it was harmless. (Everts agt. Everts, 62 Barb., 577.)

See APPEAL. (62 Barb.)
 DIVORCE. (62 Barb.)
 GIFT. (62 Barb.)
 MARRIAGE. (62 Barb.)
 RAILROAD COMPANIES. (62 Barb.)
 WITNESS.

32. In an action to set aside a judgment debtor's assignment of a bond and mortgage through a third person to his wife, the debtor's examination on supplementary proceedings is not admissible in evidence against the assignee. (Bennett agt. McGuire, 5 Lansing, 183.)

33. Evidence of the circumstances under which the contract was made, of the relations of the parties and of the usage of the trade is admissible to show the meaning of the words "his crop of flax," in a contract for the sale of flax between dealers in that article. (Goodrich agt. Stevens, 5 Lansing, 280.)

34. Accordingly held that the amount of the current year's production which the party contracting to deliver had on hand at the time of the making of the contract, by purchase as well as by production, was, in view of extrinsic evidence, intended by these words in such a contract. (Id.)

35. The rule which excludes evidence of extrinsic circumstances in explanation of the terms of a written contract discussed and explained per PARKER, J. (Id.)

36. An objection that an order for articles sold is inadmissible in evidence under the revenue laws, is untenable, as congress cannot prescribe what may or may not be evidence in the courts of this state. (Gilbert agt. Sage, 5 Lansing, 287.)

37. It appearing that a single witness as to the value of the lot was sworn before commissioners, appointed to appraise property taken for railroad purposes, who testified that he lived in the vicinity of the premises, that he knew, from what others said, the value of real estate in the vicinity, and stated the market value and amount paid for other lots in the neighborhood.

Held, that the evidence was competent and sufficient upon the question of value. (Matter of Rondout and Oswego

Railroad Co. agt. Deyo, 5 Lansing, 298.)

38. The commissioners need not, however, be controlled by the evidence taken before them as to the value of the property, but must decide according to their own judgment; and an award made without testimony would be regular. (Id.)

39. Evidence as to the intended use of the land to be taken, held admissible as a part of the *res gestæ*, to show the circumstances under which the land was taken, and its situation when appropriated. (Id.)

40. The admission of testimony to the effect that the road would damage the lot of which the land taken was a part, but that the taking of the piece would not much depreciate the value of the property, as it was left open for a road, does not justify a reversal of the proceedings. (Id.)

41. In an action to recover for breach of warranty in the sale of a chattel.

Held, that the price for which the purchaser resold the chattel was inadmissible as evidence of value. (Roe agt. Hanson, 5 Lansing, 304.)

42. An objection to such evidence, as immaterial and improper, is sufficient. (Id.)

43. In a highway commissioner's action to recover a penalty for obstructing a highway, where, as part of the evidence of a legal highway, posting of notices of a freeholders' meeting (1 R. S., 514, § 59) in three places is shown, and no objection made that they are not shown to have been posted for the required time, &c., it will be assumed that they have been sufficiently and legally posted. (Cooper agt. Bean, 5 Lansing, 318.)

44. Nor will objection to a referee's finding, "that the application and proceedings were, in manner and form, as prescribed by the statute, and that the commissioners properly laid out the highway" on the ground that the notices were not sufficiently posted, without a request for a specific finding, raise a question on appeal as to the sufficiency of the notice. (Id.)

45. It seems the order of highway commissioners to lay out a highway, introduced in evidence without objection, to prove the existence of a highway, in an action for obstructing it, is *prima facie* evidence of the commissioners' jurisdiction. (Id.)

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46. Facts assumed upon the trial as existing will be regarded on appeal as admitted. (*Id.*)

47. In an action for obstructing a highway, it seems the defendant, over whose land the way passes, may show failure to notify him to remove his fences, as required by section 96 (1 R. S., 520), in proof that the alleged highway does not legally exist. (*Id.*)

48. An objection that an assessment for expense of the highway was not ascertained by agreement, and not assessed in manner prescribed by law cannot be alleged as an objection to the legal existence of the highway. (*Id.*)

49. In an action brought to recover a balance of money received, entries made in a memorandum book by a deceased third party (the wife of the plaintiff) were allowed to be given in evidence to prove the fact of the receipt of the moneys by the defendant.

Held, error for which the judgment should be reversed. (*Miller agt. Clark*, 5 *Lansing*, 388.)

50. Evidence is inadmissible in an action against a railroad corporation for negligently causing death, to show an agreement between the plaintiff and her attorney as to the measure of his compensation and the terms on which he was to commence and prosecute the action for her as such attorney, there being no issue in respect to the proper parties to the action and no other issue to which such evidence was material. (*Cook agt. N. Y. Central R. R. Co.*, 5 *Lansing*, 401.)

51. In this action the admission of such evidence was held to be sufficient ground for reversal of the judgment, it appearing that an agreement was made for compensation out of the amount recovered, on the ground that such evidence tended to prejudice the mind of the jury against the defendant. (*Id.*)

52. Testimony of a deceased witness before a coroner's inquest, held upon the body of plaintiff's intestate, is inadmissible, on behalf of the plaintiff, in such action, although it appears that the defendant was represented by counsel upon such inquest. The inquest is not in any sense an action or judicial proceeding between the parties. (*Id.*)

53. In an action against a railroad company, for negligently causing the death of an employe, the claim to recover

was founded upon the alleged incompetency of M., a switch tender, and fellow-employe of the deceased by whose negligence, in misplacing a switch, it was alleged, the accident had occurred which occasioned the death; and it was claimed that the defendant had retained M. in its employ with knowledge of his unfitness, as he had been responsible for a similar accident which had happened at the same place. (*Id.*)

Held, the evidence justifying an inference that M. had misplaced the switch, that an offer by the defendant to show that the switch had probably been changed by some one in M.'s absence, was improperly rejected. (*Baulec agt. New York and Harlem R. R. Co.*, 5 *Lansing*, 436.)

54. *Held*, also, that evidence to show that, after the previous accident, the person having charge of defendant's track, who placed the switches and employed the switch tenders, investigated the circumstances of that accident and reported thereon to defendant's superintendent, and was told by him to retain M. in the defendant's employ, was improperly excluded. (*Id.*)

55. So, also, that such person reported to the company, after such investigation, that he found M. free from negligence respecting the first accident. (*Id.*)

56. A party to an action is not excluded from testifying, as against an heir-at-law, etc., under § 399 of the Code, in regard to a conversation between a deceased testator and a third person, as tending to show a personal transaction or communication between the witness and deceased. (*Sanford agt. Sanford*, 5 *Lansing*, 486.)

57. But testimony as to statements made by the deceased to a third person, in regard to the character of grants of land, or dispositions of moneys, previously made to his children, is inadmissible against them, to show the same to have been advancements, as hearsay. (*Id.*)

58. In an action between next of kin, the plaintiff called his brother, one of the defendants, who testified to having written letters (which were produced) to their deceased father, in which the fact was stated that the father had given him (the witness) a certain sum of money.

Held, that it was proper for the witness to explain, on cross-examination, the

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character of the alleged gift, and to show that it was not in the nature of an advancement, although objection was made that the testimony related to a transaction or communication between witness and the deceased, which had not been called for on the direct examination. (*Id.*)

59. A promissory note, taken in the name of husband and wife, survives to the wife on the decease of the husband; and, in an action for distribution of the personal property of the husband, she may show that it was appraised as part of such estate by her procurement, but under misapprehension of her rights. (*Id.*)

60. And it may be shown in such action that a legacy to the widow, in lieu of dower and of all claims against the testator's estate, was inserted in the will upon an understanding between the testator and his wife that it should be in lieu of such note, and of all claims against his estate. (*Id.*)

61. And this fact may be shown by the testimony of the attorney who received instructions from the testator for the preparation of the will and prepared it. (*Id.*)

62. On the trial of an action for damages, on account of injuries received from the falling of an upper berth upon the plaintiff, while sleeping as a passenger on the defendant's boat, in the berth beneath, the plaintiff objected to the defendant's showing, by its agent, who testified to an acquaintance with the construction of the berths of steamboats, that the berth in question was properly constructed.

Held, that the evidence should have been received. (*Tinney* agt. *New Jersey Steamboat Co.*, 5 *Lansing*, 501.)

63. And where the question was as to the effect of the injuries to the plaintiff's sight, and the defendant requested a charge, that "considering the extraordinary character of the injuries alleged in this case, and the great difficulty attendant upon their proper investigation, great weight should be given by the jury to the opinion of scientific witnesses, accustomed to investigate the causes and effects of the injuries to the eye, and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries of

science, and most improved methods of treatment and investigation,"

Held, that the charge was proper and should have been made. (*Id.*)

64. *Held*, further, where the injuries (if any) were shown to be merely temporary loss of sight, that a verdict of \$5,000 was excessive. (*Id.*)

65. In an action to recover the value of goods purchased by the defendants from a junk dealer, to whom they had been sold by one alleged to have stolen them.

Held, that the plaintiff might show the arrest, conviction and imprisonment of the thief for the theft proved, to account for his non-production as a witness, and as strengthening the evidence of the larceny. (*Pease* agt. *Smith*, 5 *Lansing*, 519.)

66. And it seems, in such case, the statement of a witness as to the fact of arrest, &c., is incompetent. (*Id.*)

67. On a verdict for the plaintiff in the case, interest is recoverable, as of course. (*Id.*)

68. Where the defense, in an action against a surety upon a written lease, was fraud in obtaining the defendant's signature as surety upon a two years' lease, and the defendant testified to his agreement to be surety for only one year:

Held, that the question, whether he would have signed as surety if he had known that he became so for two years, was properly excluded. (*Learned* agt. *Ryder*, 5 *Lansing*, 539.)

69. In an action on an agreement to pay a royalty on sales of patented implements, and to account for sales made or implements disposed of:

Held, that the manufacture and shipment of the implements from the defendant's factory was *prima facie* evidence of their sale. (*Marsh* agt. *Dodge*, 5 *Lansing*, 541.)

See ACTION. (5 *Lansing*)

ARREST. (*Id.*)

CRIMINAL LAW. (*Id.*)

CANAL CONTRACTOR. (*Id.*)

DAMAGES. (*Id.*)

GIFT. (*Id.*)

INDICTMENT. (*Id.*)

JUSTICES' COURT. (*Id.*)

MUNICIPAL CORPORATION. (*Id.*)

PRESUMPTION. (*Id.*)

PRINCIPAL AND AGENT. (*Id.*)

VERDICT. (*Id.*)

WITNESS. (*Id.*)

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EXAMINATION.

1. The object of allowing an examination to be had before issue joined, of an adverse party, under §391 of the Code is not to enable the plaintiff to ascertain whether he has a cause of action, but to enable him to obtain testimony in support of a cause of action, which he has good reason to believe he has, and especially of those facts of which he has reasonable grounds for believing the defendant has a peculiar knowledge, which he keeps concealed within his own breast. (*Winston agt. English, ante, 398*).
2. Nor is it to enable a defendant to ascertain whether he has a defense, but to enable him to obtain testimony in support of a defense which he has good reason to believe he has. (*Id.*)
3. This case is an action for a libel, and the application for plaintiff's examination is made upon defendant's affidavit, which shows the service of a complaint upon him, but does not describe the nature of the libel. No copy complaint is attached, nor has any been submitted to the court. (*Id.*)
4. The affidavit states that the defendant is advised that the examination of the plaintiff is necessary and material for the purpose of enabling him, the defendant, to frame his answer to the complaint, and to plead and prove the facts and circumstances sought to be discovered in justification or mitigation of damages. It also states what he expects to prove by such examination, and concludes by enumerating a great variety of matters. (*Id.*)
5. But the defendant does not show by whom he has been advised, as stated—does not say that he has no knowledge or information sufficient to form a belief as to the matters charged against him, and yet does not disclose what knowledge or information he does possess. No facts are stated from which the materiality or necessity of such examination can be gathered. (*Id.*)
6. As the case stands, the defendant has not only neglected to bring himself within the rules and practice of the court relative to the examination of a party under §391 of the Code before issue joined, but has failed to satisfy the court of the good faith of his application. (*Id.*)
7. The examination of adverse parties and bills of discovery considered under the common law, the Revised Statutes, court of chancery, and the Code. (*Id.*)
8. The examination of a party, provided for in section 391 of the Code, is now regulated by Rule 21, and can only be had, before issue joined, either to enable the plaintiff to frame his complaint, or the defendant to frame his answer. (*Winstan agt. English, ante, 498.*)
9. The affidavit upon which the application for an order of examination is based, must show the materiality of the discovery sought, for the purpose of framing the pleading; and if the materiality does not appear, the application should be denied. (*Id.*)
10. The defendant who applies for such an examination, in order to frame his answer to a complaint which has not yet been served, cannot show the materiality of the discovery, because he does not know what the allegations of the complaint are to be. (*Id.*)

EXCEPTIONS.

1. In an action to recover *Brokers commission* on a sale of real estate, upon the trial before the court and a jury, evidence was introduced by both parties, and at the close of such evidence, defendant's counsel moved to dismiss the complaint on the ground that a broker cannot take a commission from both parties, the motion was denied, and the defendant excepted. (*Rowe agt. Stevens, ante, 10*)
2. The court, in submitting the case to the jury, charged that, under certain circumstances stated, a broker could take a commission from both parties, and left it to the jury to say whether this was such a case—the defendant did not except to the charge of the judge nor to any insufficiency of evidence. *Held*, that the defendant was concluded by the verdict of the jury against him. Not having excepted to the judge's charge nor to the insufficiency of evidence, he could not move for a new trial on the judge's minutes. (*Id.*)
1. In an action on contract, and a general denial, at the close of the testimony on both sides, at the trial, the case presents a clear conflict as to the real agreement between the parties, and the defendant concedes such fact by omitting to move for the direction of a verdict, and by going to the jury without objection, he is too late, a new verdict rendered against him, to set aside that the case presented no evidence, or he submitted to the jury, or, at least, presented such a preponderance of evidence in his favor as to make it the

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duty of the court to direct the jury how to find. (*St. John* agt. *Skinner*, ante, 198.)

2. Where exceptions taken to the admission of testimony on the trial and to the judge's charge, are irrelevant, under the issues, and outside of the issues they could only become material by their tendency to establish, in connection with other facts to be introduced, the existence of a special agreement in avoidance or as a defense to the claim testified to by the plaintiff, it constitutes new matter, and not being specially pleaded, is properly excluded. (*Id.*)

EXECUTION.

1. When a judgment creditor dies and his executor is appointed, who, within a year from the death, applies by affidavit to the court, without notice to the judgment debtor, and obtains an order reviving the judgment in the name of the executor, and authorizing an execution on which real estate is afterwards sold:

Held, in an action of ejectment by the purchaser, that the execution was voidable not void, and one not holding under the judgment debtor could not raise the question. (*Nims* agt. *Sabine*, ante, 252.)

2. In such case the sale is good, though more than ten years have elapsed since the docket of the judgment, and no lien is necessary to authorize a sale as against the defendant in the execution or trespassors. (*Id.*)
3. When defendant is in possession, without right, after the determination of a life estate, no notice to quit is necessary. (*Id.*)

See CONVERSION. (48 N. Y.)

DAMAGES. (*Id.*)

EXEMPT PROPERTY.

SHERIFF. (*Id.*)

2. There is nothing in chapter 295 of the laws of 1850, by which act the consent of the surrogate is required before an execution can be issued against the estate of a deceased judgment debtor, that necessarily takes away from the Supreme Court the power it has always possessed of controlling the execution of its judgments. And a construction will not be given to it which would do so by implication, when it may well stand with the power thereby conferred upon the surrogate. (*The Marine Bank of Chicago* agt. *Van Brunt*, 61 Barb., 361.)

3. The consent of the surrogate specified in the act of 1850, is an additional requisite which the law has imposed to the issuing of an execution, in such a case, and was not designed to take the place of the consent of the court in which the judgment was recovered. (*Id.*)

4. By the Code, a motion is substituted in the place of the former writ of *scire facias*, in such a case. (*Id.*)

5. Some motion must be made to the court in which the judgment was recovered; and a motion for leave to issue execution upon the judgment, against the representatives of the deceased, is one of proper character. (*Id.*)

See CONSTABLE. (62 Barb.)

EXECUTORS AND ADMINISTRATORS.

1. Where by the will of the testator, his wife becomes entitled to the whole of his estate that may remain after payment of his debts. On a settlement of the accounts of the testator's executor. The executors of his wife (she having died subsequently) are necessary parties. (*Valle* agt. *Martin*, ante, 18.)

2. On such settlement the surrogate has power to ascertain the amount of the assets that passed into the hands of the executor, and the amount paid out by him upon the debts of the testator and upon payment over to the legatee; or next of kin whatever surplus of assets that might remain in his hands, he was entitled to a decree declaring such settlement to be final, and discharging him from the trust. (*Id.*)

3. But such a settlement involves no question as to the state of the accounts between the estate of the legatees under the will, except so far as may be necessary to ascertain what should belong to each. In this case that inquiry cannot arise, as the wife took the whole estate, after payment of the debts. (*Id.*)

4. Such a settlement involves no inquiry into the state of the accounts between the representatives of the wife and the executor of her husband, either in his character as executor or as trustee of the estate. As executor, he is charged with no duty in regard to the real estate, and his accounts as trustee under a deed of trust in the lifetime of his wife, cannot be adjusted on this final accounting, as executor or trustee.

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It is only when a trust is created by a last will, that the surrogate has power to settle a trustee's accounts. (*Id.*)

5. Commissions can only be allowed upon receipts and disbursements of money belonging to the estate of the wife. The debt claimed by the executor against his testator cannot be allowed to him until its validity is legally established. (*Id.*)

6. As to the claim of the executor to be allowed for debts of the estate, paid by him out of his own means, the only way he can be allowed for them is to treat him as assignee of such debts, in place of the original creditors. (*Id.*)

7. It is the duty of executors and administrators to receive the rents and profits of premises leased to their testator or intestate, accruing after his death, and to the extent of the rent reserved in the lease, to apply them in payment thereof, instead of placing them among the general assets; and they are personally liable for the rent, to the extent of the rent and profits received by them. *Prima facie*, these are sufficient to pay the whole rent; if not, it is matter of defense. (*Miller agt. Knox*, 48 N. Y., 232.)

8. A landlord may collect the rents accruing after the death of his tenant, of the estate of the deceased, or of the executors or administrators personally, to the extent of the rents and profits of the premises received by them, and the balance, if any, of the estate. (*Id.*)

9. Where a certain sum is bequeathed to executors in trust, to pay the interest thereof at a fixed and stated rate to one, and upon his death to divide the principal among others, the executors cannot, without the consent of the *cestuis que trust*, or, in case they are infants, without an order of the court, set apart and appropriate bank stocks to the satisfaction of the trust, and release the residue of the estate from its liability to perform the trust. (*Leitch agt. Wells*, 48 N. Y., 585.)

10. The *cestuis que trust* may assent to and accept such an appropriation; but if, before this is done, new interests and new parties have intervened, the situation of the property at the time of such intervention must determine the rights of all who claim to be interested in it. (*Id.*)

11. An executor has a right to sell and transfer stocks and securities of the estate, and one who buys in good faith, paying in money the price

agreed upon, or who loans money upon security of the property, is not responsible for the application of the purchase money or money loaned, and his right to the property transferred is not affected by knowledge upon his part of the existence of a claim for a legacy or a debt against the estate generally. (*Id.*)

See PARTIES. (48 N. Y.)

TRIAL. (*Id.*)

See ABATEMENT AND CONTINUANCE. (61 Barb.)

12. Notwithstanding an executor has removed from the state, and refused to give bail, after being required by the surrogate to do so, he may settle his accounts before the surrogate; and if all parties entitled to notice voluntarily appear, the surrogate has jurisdiction; and his decree for a final settlement, thus made, is final, unless appealed from. (*Everts agt. Everts*, 62 Barb., 577.)

13. An executor residing in another state, who necessarily comes to this state, to prove the will, is entitled to be allowed, on the final settlement of his account, the expenses of his journey. (*Id.*)

14. On the final accounting of an executor, it is error for the surrogate to receive evidence of the declarations of the testator against the executor, in reference to business matters between them, tending to charge the latter with an indebtedness to the estate (*Id.*)

EXEMPT PROPERTY.

A judgment recovered by a debtor against his creditor for an unlawful levy upon, and sale of exempt property, cannot be reached by the creditor through proceedings supplementary to execution. Such judgment represents the property for the value of which it was recovered. The proceeds of the judgment will be protected as exempt property until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the exempt property. (*Tillotson agt. Wolcott*, 48 N. Y., 188.)

EXPRESS COMPANIES.

1. To sustain an action against a common carrier for failing to deliver goods, the plaintiff must be the owner or have some special interest in them. (*Thompson agt. Fargo*, ante, 176.)

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2. Where a shipper and owner of goods, at the time of delivering the same to an express company for transportation, also deliver to the express company for their signature a blank receipt in their possession, filled up by him at his office, containing the names of both parties, and a series of conditions and clauses regulating the manner of transportation and the liability of the express company in certain cases and contingencies, and such receipt at the time of the delivery of the merchandise is presented by the shipper to the express company for their signature, and is signed by the latter and returned to the shipper, it constitutes a *special contract*, and binding upon both parties when acted under. (*Falkenan agt. Fargo, ante, 325.*)
3. Where such contract provides that the express company is not to be held liable for any loss or damage by fire, they are not liable where the goods shipped are burned up, without any fault or neglect on the part of the company, while in *transitu*. (*Id.*)
4. Where an express company agrees to *forward* a package to a point beyond the terminus of its route, the contract expressly limiting its liability to that of forwarders, and through charges not having been paid, the liability of the company as a common carrier ceases at the end of its route, and if the package arrives there in safety and is delivered with proper instructions to another responsible carrier upon the line to the point of destination, its liability ceases. The equivalent of the words "to forward" is "to send," not "to carry." (*Reed agt. U. S. Express Co., 48 N. Y., 462.*)

EXTRADITION.

1. The law of this State passed in 1822 providing that the governor may in his discretion, deliver over to justice any person found within the State who shall be charged with having committed *without the jurisdiction of the United States*, any crime except treason, which by the laws of this State, if committed therein, is punishable by death or by imprisonment in the state's prison, is *unconstitutional and void*. (*In the matter of Vogt, ante, 171.*)
2. The petitioner, it appeared was in custody under a warrant issued by the governor of this State, at the request of the Belgian minister committing him, for surrender to the authorities of that government, as a person charged with

having committed murder, arson and robbery in Belgium. It also appeared that he was held under a commitment to answer an indictment for grand larceny. (*Id.*)

3. No provision by *treaty* for the extradition of persons charged with crimes, exists between the United States and Belgium.

Held, that the warrant for the surrender of the petitioner to the Belgium authorities is unconstitutional and void, and insufficient for his detention. (*Id.*)

4. But the commitment upon the indictment for grand larceny, being under a statute of the State, for bringing stolen goods into this State, his discharge was refused. (*Id.*)

F.

FIXTURES.

1. There are several tests which aid in determining the question whether articles, personal in their nature, have acquired the character of real estate. 1st. Actual annexation, which must be of a permanent character, except in case of those articles which are not themselves annexed, but are deemed to be of the freehold from their use and character. 2d. Adaptability to the use of the freehold. 3d. The intention of the parties at the time of making the annexation. In the case of machinery, the circumstance that it may or may not be removed from the freehold, without great injury to the building containing it or to itself, is not now deemed to be controlling. (*Voorhees agt. McGinnis, 48 N. Y., 278.*)

FORECLOSURE.

1. The statute providing for foreclosure of a mortgage by advertisement is to be complied with substantially, but with regard to the objects intended by it. (*Hubbell agt. Sibley, 5 Lansing, 51.*)
2. An erroneous statement in the notice of sale, of matters not required by the statute to be stated, and which is calculated to mislead and to prevent bidding, will, it seems, render the sale void, but not if inserted by mistake and a correction published with the notice, before it can be presumed to influence persons desiring to bid. (*Id.*)
3. A sale is not invalid or irregular, as to

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owners of judgment liens served with notice, on account of omission to serve other incumbrancers, or for omission to serve the wife of the mortgagor, who united in the mortgage. (*Id.*)

4. It seems a wife who joins with her husband in a mortgage of his real property is a mortgagor, but the sale is not invalid as to a judgment creditor, because she is not made party to the proceedings. (*Id.*)

5. The mortgagee or owner of the mortgage may advertise and sell the property, although he becomes the purchaser and makes the affidavit which stands in the place of a conveyance. (*Id.*)

6. A mortgage sale, under the statute, of mortgaged premises in gross, which have subsequently to the execution of the mortgage been divided into lots, is valid. (*Id.*)

7. A jurat, certifying the appearance of the affiant and administration of the oath to him, complies with section 11 of the statute (2 R. S., 547.) (*Id.*)

See ALTERATION OF INSTRUMENT. (5 *Lansing.*)

FORFEITURE.

See ESTOPPEL. (5 *Lansing.*)
LEASE. (*Id.*)

FORGERY.

The erasure from a bond of an indorsement of a payment made thereupon, does not, it seems, constitute the offense of forgery of the bond. (*Dennis* agt. *Ryan*, 5 *Lansing*, 350.)

See EVIDENCE. (48 *N. Y.*)

FOREIGN ATTACHMENT.

1. In an action brought by the receivers of an insurance company, upon premium notes, it is no defense that before the commencement of the action, but after the company had ceased to have a corporate existence, the claim in suit had been attached, in an action pending in the State of Massachusetts, where the defendant resided, by a creditor of the insurance company, and that the plaintiffs had made themselves parties to that suit, which was still pending. (*Osgood* agt. *Maguire*, 61 *Barb.*, 54.)

2. The pendency of an attachment suit in another state is no bar to the action here, although a judgment, there, might be. (*Id.*)

FOREIGN LAWS.

1. If a court has no means of information as to what the law of another country or state is, it will act upon its own laws. But if such country once constituted a part of the same kingdom or government with that where the court sits, and they were governed by the same laws, the court will take judicial notice of the laws which prevailed in both before their separation, as matter of public history, and presume them unchanged, till the contrary be shown. (*Stokes* agt. *Macken*, 62 *Barb.*, 145.)

2. The United States having been once a part of the British empire, our courts take judicial notice that the common law was in force within her dominions at the time of our separation: and in absence of proof to the contrary, they presume, also, that the law remains unchanged. (*Id.*)

FORMER ADJUDICATION.

1. A judgment by default in an action to recover a payment of interest due upon a promissory note, where process was personally served and defendant appeared, but did not answer, is conclusive evidence against a defense of usury interposed in an action between the same parties, brought to recover the principal of said note. (*Norton* agt. *Hook*, 48 *N. Y.*, 675.)

See *Taylor* agt. *Spader* (*Mem.*). (48 *N. Y.*, 664.)

Stackpole agt. *Robbins* (*Mem.*). (48 *N. Y.*, 665.)

FORMER SUIT.

Creditors, who had seized, upon attachment, the property of their debtors, in the hands of an assignee for the benefit of creditors, being sued by the assignee, for the conversion of the property, set up as a defense that the assignment was invalid for fraud. The defense was ruled out, because their attachment had been set aside for irregularity, and they were thus left without justification, and were mere tort-feasors, and could not dispute the title of the assignee in possession; and the question as to the validity of the assignment was not litigated and determined, as it was held not to arise. Held, that the judgment in that action was no bar to a subsequent action by the creditors against the assignors and assignee to set aside the assignment. (*Yates* agt. *Lyon*, 61 *Barb.*, 205.)

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FRAUD.

See FRAUDULENT CONVEYANCES.

PARTNERSHIP. (48 N. Y.)

PRINCIPAL AND AGENT. (*Id.*)Terry agt. Wait (*Mem.*) (48 N. Y., 657.)

PRINCIPAL AND AGENT. (62 Barb.)

FRAUD AS TO CREDITORS.

1 This action was brought to recover the value of 1364 gallons of wine, belonging to the plaintiff, which was levied upon and sold by the defendant under an execution against S. and L. (*Jaeger agt. Kelly, ante, 122.*)

2. The defendant's counsel demanded to go to the jury, 1st, upon the question whether the sale of the 15 casks of wine by L. to the plaintiff was in fraud of S., a creditor of L. 2nd, As to what were the contents of the casks. 3rd. Also requested the court, to instruct the jury that there was no evidence upon which they could find that the casks contained 1364 gallons of wine. 4th, That interest by way of damages on the value of the wine could not be included in their verdict for the plaintiff—The court refused these requests and directed the jury to find for the plaintiff, leaving it to them to assess the damages.

Held, that there was no contradictory evidence on the question of title, and no evidence to prove any fraud in the sale.

Held, also that the inadequacy of price was not a sufficient ground to hold the sale fraudulent, or to sustain a verdict for the defendant.

Held, also, that there was some evidence but slight, that L. disposed of the wine to prevent its being reached by S. as a creditor, but there was none affecting the plaintiff with a guilty knowledge or that his purpose was not honest and fair.

Held, also that there was evidence *prima facie*, that the casks contained wine. There was evidence that the casks were gauged by government officials, as containing the quantity stated. As against an alleged trespasser the proof was quite sufficient—It was for him to give evidence to raise a doubt, before the jury could be called upon to decide it (*Id.*)

3. There is no doubt that interest may be added to the value at the time of the conversion as damages. (*Id.*)

4. Where a gift of money is made by

the husband to his wife, while he is indebted to various creditors, the statute declares such gift *fraudulent* as to those creditors. (*Partridge agt. Stokes, ante, 381.*)

5. Where the plaintiff, after having obtained judgment personally against the husband for some \$1,100, upon which execution had been issued and returned unsatisfied, commenced an action against both husband and wife in the nature of a judgment creditors' bill, to reach money, claimed to have been fraudulently received by the wife as a gift from her husband, and to have been used by the wife upon her real estate, and it appeared in evidence, by the admissions of both husband and wife, that he had, some time previously, given his wife \$500, and, perhaps, more; that no accounts had been kept between them; but she stated that she had paid back to her husband, at different times, as much as she had received from him. And it also appeared that about that time the wife—within about a month—had deposited to her credit, in a savings' bank, something over \$3,000.

Held, that the loose and unsatisfactory evidence of the defendants can not be allowed to cover up the dealings between the parties engaged in defrauding the creditors of either or both, especially where, as in this case, a fraudulent intent was fully proved. (*Id.*)

6. It is well settled that where a conveyance is executed with intent to defraud creditors, it is void not only as to existing, but as to future creditors. (*Id.*)

FRAUDS, STATUTE OF.

1. When a contract is for the sale of goods, &c, on which work and labor is to be thereafter bestowed, in order to make and put it in the condition contemplated in the contract, it is not within the clause of the statute of frauds relating to the sale of goods, wares and merchandize, and which requires a memorandum in writing, unless there is delivery and acceptance, and earnest paid. (*Ferren agt. O'Hara, 62 Barb., 517.*)

2. The defendant agreed to sell ten cows at fifty dollars each, with right on their delivery to two more at seventy-five dollars each, and the purchaser paid earnest money. Before they separated it was understood between the parties that the two cows should be

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counted in the contract; no writing passed. The purchaser told the plaintiff he might take the two cows upon the contract terms, and the vendee consented to accept the plaintiff as his debtor, and gave him credit as a substitute for the purchaser, and also agreed to keep the cows for him for hire. The ten cows were paid for and delivered according to the contract, and the earnest was applied as part of their price. In an action for the value of the two cows after defendant's refusal to deliver them on demand:

Held, that the plaintiff was entitled to recover. (*Brown* agt. *Hall*, 5 *Lansing*, 177.)

3. A contract for purchase of personal property, at the option of the purchaser, when money is paid on it, is valid and binding on the parties, although not in writing. (*Id.*)

4. Defendants verbally ordered, at a price exceeding fifty dollars, from the yard of plaintiffs, who were lumber dealers, and also had a planing mill, at which they dressed and cut lumber for sale, certain lumber, to be dressed and cut from logs examined by defendants, according to certain directions given by defendants, and directed plaintiffs, when said lumber was ready for delivery, to place it on plaintiffs' dock, and to notify one P., a forwarder, who would send a boat for it. The lumber was accordingly prepared as directed, and placed on plaintiffs' dock, measured and ready for delivery, and P. notified of its being there and requested to send a boat and take it away. No instructions had been given to P. by defendants or otherwise in regard to it. The next day, which was Sunday, the lumber yet remaining on the dock, was consumed by fire with other property. No part of the price was ever paid. A memorandum of the order was made by plaintiffs, but was not signed by defendants or on their behalf:

Held, that the contract was one for sale of goods, and not a mixed one of sale and for labor to be performed. (*Cooke* agt. *Milard*, 5 *Lansing*, 243.)

5. That there was no sufficient receipt and acceptance of the goods by defendants to take the case out of the operation of the statute of frauds. (*Id.*)

6. That the contract was, therefore, one within the statute and void, and that plaintiffs could not recover the price of the lumber. (*Id.*)

7. A. being the owner of a mowing ma-

chine, and being indebted to B. in the sum of fifty-five dollars, proposed to B., verbally, the machine not being present, that he should take it in satisfaction of his indebtedness, to which B. assented. The machine remained in the hands of A. for some time afterward, and was then, without B.'s request, delivered into possession of C., from whom it was taken under execution against A:

Held, in action brought by B. to recover the value of the machine against the constable who had seized it under the execution, that such action could not be sustained, as there was not a valid sale from A. to B., under the statute of frauds. (*Walrath* agt. *Ritchie*, 5 *Lansing*, 362.)

FRAUDULENT CONVEYANCES.

The sale of the entire effects of an insolvent copartnership upon credit, at a fair valuation, to a responsible vendee having knowledge of the insolvency, is not *per se* fraudulent. Although made by the vendor with intent to hinder, delay and defraud creditors, that does not affect the title of the purchaser, unless he had previous notice of the fraudulent intent. (*Ruhl* agt. *Phillips*, 48 *N. Y.*, 126.)

FRAUDULENT REPRESENTATIONS.

See ACTION. (61 *Barb.*)

LEASE.

LIMITATIONS, STATUTE OF. (61 *Barb.*)

G.

GENERAL TERM.

See APPEAL. (48 *N. Y.*)

GIFT.

1. Where there is a contest respecting a gift, between the donee and the representatives of the donor, the declarations of the donor are admissible, being against his interest when made; and the admissions of the testator or intestate, as a universal rule, are admissible against his representatives. (*Hackney* agt. *Vrooman*, 62 *Barb.*, 650.)

2. Where a bond and mortgage were found, after the mortgagor's death, in a tin box of his, containing paid notes, papers of old dates, bills of goods, old outlawed notes due him, and other

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miscellaneous papers, and there was proof of a declared intention of the mortgagee to give the bond and mortgage to his daughter (the wife of the mortgagor): *Held*, that in the absence of any evidence casting suspicion upon the *bona fides* of the possession of the securities by the mortgagor, at the time of his death, such possession was presumptive evidence of a gift to his wife. (*Id.*)

3. Whether a gift of a bond and mortgage be *inter vivos*, or *causa mortis*, the donee acquires a legal as well as equitable title to the securities, by mere delivery, without writing. (*Id.*)
4. To render a gift effectual, there must be delivery of the thing which is the subject of the gift, and the donor must part with all interest in and control over the subject of the gift; if the thing is not susceptible of delivery, there can be no gift. (*Doty* agt. *Wilson*, 5 *Lansing*, 7.)
5. A mere parol release of a debt, without consideration, is void. (*Id.*)

GOODS SOLD AND DELIVERED.

1. Where the complaint is for goods sold and delivered, without proof of delivery, the cause of action stated in the complaint, and upon which issue is taken is not made out. If the defendant does not appear, on the trial, and therefore waives nothing, and there is no evidence in respect to a delivery, a judgment in favor of the plaintiff should be reversed for that reason. (*Everett* agt. *Parks*, 62 *Barb.*, 9.)
2. In construing guaranties, the real inquiry is, what was the intention of the guarantor; and to ascertain this his words must be taken in their popular and obvious sense. This is the true meaning of the contract which readily presents itself to a plain man of common understanding, on reading it attentively and impartially, and not that which is elaborated with effort. The agreement is not to be construed most favorably for the guarantor, nor most strongly against him. (*Crist* agt. *Burlingame*, 62 *Barb.*, 351.)

GRANTOR AND GRANTEE.

See COVENANTS. (48 *N. Y.*)
DEEDS. (*Id.*)

GUARANTY.

1. The defendants, on the 25th of April 1870, at Troy, N. Y., wrote to Messrs

Allen & Co. of New York, plaintiffs, a letter, of which the following is a copy: "Troy, April 25, 1870. Messrs Allen & Co. New York. Gents. The bearer, Mr. Leonard Wager, Troy, N. Y., is going to start a peddling route to sell cigars and tobacco. He wishes to buy his goods of your firm, if you will give him a liberal credit. We, the undersigned, will be his security to the amount of \$1,000. Signed, T. S. BANKER, P. J. MARSH." (*Sickle* agt. *Marsh*, *ante*, 91.)

2. Wager, between April 26, 1870, and August 12, 1870, purchased of plaintiffs, at different days, cigars and tobacco, amounting in all to \$2,178.55. The first sale amounted to \$786.78, and on several different days during said term paid on account sums of money amounting in all to \$1,412.28. At no time did his indebtedness exceed \$1,000. The unpaid balance for which this action was brought was \$766.27, due on average time, Sept. 12, 1870.

Held, that this letter was a *continuing guaranty*, and rendered the defendants liable until notice to the contrary. (*Id.*)

GUARDIAN.

See INFANTS. (1 *Barb.*)

H

HABEAS CORPUS.

1. When children are in the custody of their father, and are brought by him into court, in obedience to a writ of *habeas corpus*, sued out by the mother, he thereby surrenders them to the custody of the court as *parens patriæ*, pending the litigation. (*Matter of Viele*, *ante*, 14.)
2. And when the father and mother thereafter stipulate and consent that the writ be dismissed, it is proper that the order of the court entered upon that consent should not only direct that the writ be dismissed, but should dispense with the longer attendance of the children in court, by remanding them to the custody of the father, with whom the court found them, and also is *prima facie* entitled to them, although a neglect to add such an express provision to the order of dismissal of the writ is not *necessary* for the purpose of rehabilitating the respondent with parental authority, when the relator

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abandons the attempt to change the custody of the children to herself. (*Id.*)

3. If the mother afterwards improperly obtains possession of one of the children, and flees with it to a foreign country, she thereby renounces her right of applying to the court for any relief in the premises. (*Id.*)
4. Where it appears from the sheriff's return to a writ of *habeas corpus*, that the relator is held by him upon civil process, and that another person, viz., the plaintiff in the judgment, has an interest in his detention, eight days' notice of the time and place at which the writ is made returnable, must be given to such plaintiff, or his attorney; and without such notice the court has no power to grant the discharge. (*The People ex rel. Hewlett agt. Brennan*, 61 Barb., 540.)
5. On the return to a writ of *habeas corpus*, it is well settled that the party imprisoned may inquire into the jurisdiction of the tribunal by which he was committed; and if he is able to show that such tribunal has no jurisdiction to try, convict or commit, he is entitled to his discharge. (*The People ex rel. Stetzer agt. Rawson*, 61 Barb., 619.)

HIGHWAYS.

The last clause of section 1 of the "Act to amend the Revised Statutes in respect to highways" (Laws of 1861, chap. 311), which provides that all highways that have ceased to be traveled or used as such for six years shall cease to be highways for any purpose, is not limited by the second section of said act to highways "laid out and dedicated," but applies as well to highways created by twenty years' user. Said clause, however, is not retroactive in its effect, but only applies to such highways as have ceased to be traveled or used for six years after the passage of the act. (*Amsbry agt. Hinds*, 48 N. Y., 57.)

2. As commissioners of highways have no power to lay out a private road for one person over the lands of another, without the consent of the latter, it is his consent alone which gives any force to the acts of the commissioners. (*Dempsey agt. Kipp*, 62 Barb., 311.)
3. A consent that a private road may be laid out on the line between the farm of the party consenting and the adjoining farm, one half to be on each farm, will not authorize or justify the

laying out of the whole road on the land of such consenting party. (*Id.*)
See RAILROAD COMPANIES. (61 Barb.)

HOSPITAL.

See CORPORATION. (61 Barb.)

HUSBAND AND WIFE.

1. Where a gift of money is made by the husband to his wife, while he is indebted to various creditors, the statute declares such gift fraudulent as to those creditors. (*Partridge agt. Stokes*, ante, 381.)
 2. Where the plaintiff, after having obtained judgment personally against the husband for some \$1,100, upon which execution had been issued and returned unsatisfied, commenced an action against both husband and wife in the nature of a judgment creditors' bill, to reach money, claimed to have been fraudulently received by the wife as a gift from her husband, and to have been used by the wife upon her real estate, and it appeared in evidence, by the admissions of both husband and wife, that he had, some time previously, given his wife \$500, and, perhaps, more; that no accounts had been kept between them; but she stated that she had paid back to her husband, at different times, as much as she had received from him. And it also appeared that about that time the wife—within about a month—had deposited to her credit, in a savings' bank, something over \$3,000.
Held, that the loose and unsatisfactory evidence of the defendants can not be allowed to cover up the dealings between the parties engaged in defrauding the creditors of either or both, especially where, as in this case, a fraudulent intent was fully proved. (*Id.*)
 3. It is well settled that where a conveyance is executed with intent to defraud creditors, it is void not only as to existing, but as to future creditors. (*Id.*)
- See MARRIED WOMEN. 61 (Barb.)
4. Prior to the passage of chapter 90 of the laws of 1860, a husband was entitled to the coverture. (*Stokes agt. Mackon*, 62 Barb., 145.)
 5. All the recent statutes of this state, for the protection of married women in their estates, being in *paria materia*, are to be construed as one, in their letter, spirit and intent, precisely as if

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they were contained in one act. *Per* POTTER, J. (*Perkins* agt. *Perkins*, 62 Barb., 531.)

7. The new powers, conferred on married women, by these statutes, were in derogation of the common law, and are to be strictly construed. *Per* POTTER, J. (*Id.*)

8. The unity of persons created by the marriage contract, between husband and wife, has been no further severed, by those statutes, than the statutes in express terms, or by necessary implication, have effected that purpose. (*Id.*)

9. A husband cannot, since those statutes were passed, maintain an action at law against his wife, to recover pay for services rendered, any more than he could before. (*Id.*)

See MARRIAGE. (61 Barb.)
WITNESS. (*Id.*)

I.

ILLEGAL CONTRACTS.

See CORPORATION. (62 Barb.)
PROMISSORY NOTES. (*Id.*)

IMPLIED COVENANTS.

See CHATTEL MORTGAGE. (48 N. Y.)
CONTRACTS. (*Id.*)
COVENANTS. (*Id.*)
DEEDS. (*Id.*)

INDEMNITY.

1. Taking indemnity by a public officer, is not unlawful because not expressly authorized by statute. If the obligation is good at common law, it is not avoided by the statute. (*Turner* agt. *Hadden*, 62 Barb., 480.)

See BOND. (62 Barb.)

INDICTMENT.

See CRIMINAL LAW. 61 Barb.

1. An indictment for perjury before inspectors of election, alleging commission of the crime before the board of inspectors "then and there duly authorized to administer the oath," is not, it seems, defective for omitting to state the names or number of the inspectors. (*Burns* agt. *The People*, 5 Lansing, 189.)

2. Or that the inspectors were acting for a particular ward. (*Id.*)

3. Or stating that the prisoner was "duly sworn," &c., for omitting to show the manner and form in which the oath was administered. (*Id.*)

4. And, it seems, the averment that he was "duly sworn" is a sufficient statement that the proper statutory oath was administered. (*Id.*)

5. And that it is unnecessary that the indictment should show that the place where the oath was administered had been legally appointed and constituted as the place for holding elections, where it is stated that the election was held pursuant to law before a board of inspectors legally constituted and authorized according to law. (*Id.*)

6. But where the falsity of the oath was alleged to be in swearing not to have voted previously at the same election, and an averment was made that the prisoner had done so, at a place named, without stating that it was before a board of officers duly constituted and authorized, or that any lawful election had been appointed or held at the place:

Held, that the indictment was for that reason faulty in substance, and the defect not within the intent of the statute (2 R. S., 728, § 52). (*Id.*)

7. An indictment for robbery charged the taking of money and bank bills, viz.: A certain sum in bills known as U. S. legal tender notes, and a certain sum in currency known as postal currency. The proof was that the moneys taken were national bank notes and fractional currency under the act of congress of March, 1863 (12 U. S. Stats. at Large, 711, § 4):

Held, that there was a substantial variance between the indictment and proof given, and the jury should have been instructed to render a verdict for the prisoner, or the case should have been dismissed. (*People* agt. *Jones*, 5 Lansing, 340.)

INFANTS.

1. The suing by a next friend, in cases of actions brought by infants, is, of necessity, repealed by section 115 of the Code. And the new system nowhere provides for the guardian of an infant giving bail; but gives the defendant an equivalent in section 316, by making the guardian liable for costs. (*Linner* agt. *Crouse*, 61 Barb., 289.)

See ACCUMULATION. (5 Lansing.)
PARENT AND CHILD. (*Id.*)

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INJUNCTION.

1. An *injunction pendente lite* will issue to restrain town officers from the issuing of bonds of the town for railroad purposes where it is alleged that the town had no authority to create such bonds by reason of a defect in the petition of the tax payers of the town. The county clerk's certificate is not conclusive evidence of such authority. (*Town of Rochester* agt. *Davis*, ante, 95.)
2. Where the plaintiffs voluntarily publish pictures to the public, for which they claim the proprietary right, the published copies furnish the defendants the means of reproducing the pictures without any invasion of the plaintiffs' proprietary rights therein. (*Oertel* agt. *Jacoby*, ante, 179.)
3. It is ministerial, not judicial officers, whom the court has power to restrain when proceeding illegally under a claim of right. The process of injunction, in a proper case for staying a judgment, goes against the parties, not the tribunal or its judges. (*W. R. Co.* agt. *Nolan*, 48 *N. Y.*, 513.)
4. The rule denying the right to interfere by injunction to restrain the collection of a tax, is one of public policy, and it is equally applicable to the case of an assessment. (*Id.*)
5. There is no precedent for an injunction to restrain acts upon the ground that they may possibly or probably result in forming and casting a cloud upon the title of a party. *Per* *JOHNSON, J.* (*Phelps* agt. *The City of Watertown*, 61 *Barb.*, 121.)
6. Where one has adopted a word from the French language, to designate an article which he is engaged in manufacturing and selling, by that name, he acquires, by such adoption, a property in the use of the word as applied to the article he has made and introduced into the market, although the article was previously sold in France by the same name; and an injunction will lie to restrain the use of the name by another manufacturer. (*Rillet* agt. *Carlier*, 61 *Barb.*, 435.)

See MUNICIPAL CORPORATIONS. (61 *Barb.*)
ACTION. ((62 *Barb.*)

7. The expenses of an unsuccessful motion to set aside an injunction cannot be recovered upon an undertaking under section 222 of the Code, although the court afterward decide that the de-

fendant was not entitled to the injunction. (*Allen* agt. *Brown*, 5 *Lansing*, 511.)

8. Costs or counsel fees, or other expenses of defending an action in which a preliminary injunction has been granted, where there is nothing to show that the injunction rendered the trial of the action more difficult, or that the injunction increased the costs or expense of the defense, are not damages "sustained by reason of the injunction." (*Id.*)

See JUDGMENT DEBTOR, &c. (5 *Lansing*.)

PRESCRIPTION. (*Id.*)

R. R. MUNICIPAL BONDS. (*Id.*)

INSOLVENCY.

1. A petitioning creditor under the two-thirds act, who adds to his signature the declaration of release required by said act (2 *R. S.*, 36, § 11), thereby only transfers to the assignee any and every lien or security upon the estate and property of the debtor, not a lien or security upon the property of a third person. When, therefore, such creditor has a joint judgment against two, the signing of the petition of one does not transfer to the assignee his claim against or lien upon the property of the other. (*Elsworth* agt. *Caldwell*, 48 *N. Y.*, 680.)
2. The bare omission, by an insolvent debtor, applying for a discharge under the insolvent laws of Massachusetts, to set forth a particular debt, in his petition, will not vitiate the discharge, where the omission is admitted to have been neither willful nor fraudulent. (*Hall* agt. *Robbins*, 61 *Barb.*, 33.)
3. Where a commissioner of insolvency in Massachusetts, having acquired jurisdiction of the case, adjudged that the insolvent had assigned his estate for the benefit of his creditors, according to the provisions of the insolvent law of that State, and had in all things conformed to the directions of such law, and discharged the insolvent from his debts; *Held* that the record in Massachusetts must be deemed conclusive here. (*Id.*)

INSANITY.

1. There is no presumption of law that a person who commits suicide was insane, or that the fact of suicide is *prima facie* evidence of insanity (*FREEDMAN, J. dissenting. See his opinion.*). (*Coffey* agt. *The Home Life Ins. Co.*, ante, 481.)

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2. Aside from extrinsic facts and circumstances, the law presumes that every person who destroys his own life, is sane up to the very moment when he does the act which causes his death. It cannot therefore be properly said that the commission of that act, not only removes the presumption of sanity, but establishes a legal presumption that he was then insane (*Per BARBOUR, Ch. J.*) (*Id.*)

INSURANCE.

1. The defendants issued a policy of insurance to Marilla Kirk, executrix and trustee of Andrew Kirk, deceased, insuring "the heirs and representatives of Andrew Kirk, deceased," against loss or damage by fire for one year, to the extent of \$1,000, on a grist mill belonging to said estate. Subsequently Mrs. K., the trustee during the term of insurance and previous to the fire, sold said mill to one Arnold (who was in possession under a lease) for \$8,000, and took back a mortgage to secure \$7,000 of the purchase money. There was no assignment of the policy by Mrs. K. nor any notice of the sale given to the company. The plaintiff was substituted as trustee in place of Mrs. K. before the commencement of this action. The policy contained the following clause, to wit:

"If the property be sold or transferred, or any change takes place in the title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance," then the policy shall be void.

Held that this clause did not operate as a forfeiture or render the policy invalid. It was the trust fund that was intended to be secured by the insurance, and there has been no transfer of that property or interest. (*Affirming S. C. at Special Term. 43 How.*) (*Savage agt. Howard Insurance Company, ante, 40.*)

2. Where a policy of marine insurance was made out to J. H. "for account of whom it may concern," the action to recover the amount of insurance is properly brought by J. H., he being the trustee of an express trust under the Code. (*Hughes agt. Merran. Mut. Ins. Co., ante, 351.*)
3. Insurers may contract for antecedent risks, and, by express agreement, insure against a prior total loss. (*Id.*)
4. If a time policy of marine insurance does not contain the words "lost or not

lost," but is ante-dated by the insurers, they assume a retrospective risk, for which the policy provides, in the same manner as if it had been issued on the day it bore date. (*Id.*)

5. If a policy of marine insurance describes a vessel insured, as the bark *Empress*, or by whatever other name or names the vessel is or shall be called, and it appears, from the testimony, that the name of the vessel had been changed to the *St. Mary*, it was properly submitted to the jury to determine what vessel was intended to be insured. (*Id.*)

6. Where a general agent of a life insurance company, under an agreement with a physician, issued a policy of insurance to the latter, whereby the physician agreed to pay a certain sum (\$284 35) annually, as premium, for ten years, upon the condition that said agent employ the assured as an examining physician for the company, and that the services of the physician should be paid by such premium: and it appeared, on the trial of the action by the insurance company against the physician, to recover the first premium note of \$284 35 that the agent had no authority, by his agreement with the company or otherwise, to make such an agreement for insurance, and as the company had never, in any manner, ratified the same, the policy of insurance was invalid and the premium note void. (*Anchor Life Ins. Co agt. Pease, ante, 385.*)

7. The transaction was not an ordinary one which would come under the general powers and duties of a general agent, but an extraordinary one requiring specific authority. (*Id.*)

8. Defendant issued to plaintiff a policy of insurance, covering his stock of goods on the first floor of the building, No. 39 Centre street, N. Y. Prior to the expiration of the policy, plaintiff removed the goods and business to an upper story in the same building. Defendant, with full notice of the change of location, received the premium for renewal, and issued a renewal receipt referring to 39 Centre street, and to the former policy, but expressing in itself no restriction to the first floor. The property being destroyed by fire, in an action to recover the amount insured:

Held, that it must be presumed the company intended to give a valid insurance, as to presume the contrary would be to impute a fraudulent intent; it also intended plaintiff to understand he

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had received such an insurance. The contract of reinsurance, therefore, will be construed as covering the goods in the new location, and in this respect modifying the original contract. (*Ludwig agt. Jersey City Ins. Co.*, 48 N. Y., 379.)

9. A provision in a policy of life insurance, forfeiting the policy in case the assured shall enter into any military or naval service without the consent of the company, includes only such service as will require the person entering into it to do duty as a combatant. An employment, therefore, by military authorities, in constructing a railroad bridge, is not within the prohibitions of the policy, and does not invalidate it. (*Wells agt. Conn. Mut. Life Ins. Co.*, 48 N. Y., 34.)

10. At the time of issuing the policy in question, defendant for a further premium of fifty dollars, by a written instrument, gave the assured permission to go south of the thirty-sixth degree of north latitude and reside there during the time of one year; provided, and with the understanding and agreement, that the policy did not insure against death from any of the casualties or consequences of war or rebellion, or from belligerent forces. While engaged in building a railroad bridge, under the direction of the military authorities of the United States, about thirty miles in the rear of the Union army, and still further from the Confederate forces, the assured was shot and killed by two of a party of men not in uniform, who robbed the men employed upon the work and residents near.

Held, that the language of the proviso included only death from casualties or consequences of war or rebellion carried on or waged by authority of some *de facto* government; that this case did not come within that limit, and that defendant was liable. (*Id.*)

11. An insurance for a single premium upon a vessel, at and from the port where she is lying to another, is a continuous and indivisible risk; and a voluntary and unnecessary departure from port, except upon the voyage insured, avoids the policy and discharges the underwriter from all liability under it. (*Fernandez agt. G. W. Ins. Co.*, 48 N. Y., 571.)

12. Defendant insured plaintiff's vessel then lying in port at New York, undergoing repairs, "at and from New York to Havana." After the repairs were completed the vessel went on a

trip to Elizabethport, N. J. (sixteen miles distant from New York), to test her engines and take in coal. She returned to New York and subsequently sailed for Havana, and while prosecuting her voyage was destroyed by fire.

Held, that the voyage to Elizabethport was in violation of the terms and conditions of the policy, and defendant was not liable thereon. (*Id.*)

13. Warranties in a policy of insurance must be strictly and perfectly complied with; this strict compliance, however, operates in favor of as well as against the assured when he brings himself within the terms thereof. (*Snow agt. Col. Ins. Co.*, 48 N. Y., 624.)

14. A warranty in a policy of marine insurance not to use a certain port means not to go into it. Going near or in the direction of the prohibited port is not a breach of the warranty, and this is so although the vessel was approaching with intent to enter the port. The fact and not the intent, gives the legal character to the transaction. Where, therefore, a vessel, covered by a policy containing such a warranty, while sailing toward the prohibited port with intent to enter it, is lost before reaching it, there is no breach of the warranty and the underwriters are liable. (*Id.*)

See Sands, Rec'r, agt. Graves (Mem.), (48 N. Y., 653).

15. Where the application is made a part of the policy, the statements contained in it are warranties, and a compliance with them conditions precedent to a right to recover. (*Pierce agt. The Empire Ins. Co.*, 62 Barb., 636.)

16. Whatever is said in the application as to the intent of the assured in the property, is material and important, but does not affect the risk. The nature, situation and condition of the property, its exposure to fire from within, as well as from without, are matters affecting the risk. (*Id.*)

17. Representations relate exclusively to the risk; to the matters which would have a tendency to induce the insurer to enter, or to refuse to enter into the contract, or to lessen the premium which he would charge for insuring. In this view, ownership is not the subject of representation. (*Id.*)

18. Hence, whatever is said in the policy on that subject, must be by way of warranty. (*Id.*)

19. Knowledge of the interest of the in-

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sured in the property, or premises, is important to the insurer, and when the insured is called upon to state such interest truly, and it is stated untruly, the representation is a warranty, and if stated untruly, the policy is void. (*Id.*)

20. A foreign insurance company which has issued a policy on the life of a citizen of this country, is to be considered as not affected by the state of war which existed between the different sections of the United States from 1860 to 1864, but is to be deemed a neutral; and the contract of life insurance is not impaired by the war. (*Martine agt. The International Life Assurance Society of London*, 62 Barb., 181.)
21. And where such a company had agents at Fayetteville (N. C.) during the war, who were agents for the purpose of receiving premiums; *Held* that all payments of premiums, made to them by persons insured, were valid and bound the insurers. (*Id.*)
22. Where an agency of an insurance company was given to two persons, not as individuals, but as partners, composing the firm of S. & P.; *Held* that both were liable for the acts of either, and the principal had the right to suppose that the joint action of both would be invoked in the discharge of the agency, (*Id.*)
23. In the absence of statutory provisions requiring contracts of insurance to be in writing they may be by parol. (*Rhodes agt. Railway Passengers' Assurance Co.*, 5 Lansing, 71.)
24. And where there is no limitation of his power, such a contract may be made by parol for the insurance company by its lawfully constituted general agent. (*Id.*)
25. The powers of a general agent to make such a contract of insurance are not necessarily limited where he receives from the company a book of blank policies signed by its president, with intent that they shall be filled in and delivered to the person who insures. (*Id.*)
26. Where there is an agreement to issue a policy, under which delivery is due and alone remains unperformed, equity will decree payment of the insurance according to the conditions of the policy. (*Id.*)
27. In an action to recover on an agreement to insure against inability to labor arising from accidental injuries, the intemperance of the insured is

wholly immaterial, unless it contributed, in some degree, to cause the injury; as where the intemperance was shown to be subsequent to the accident. (*Id.*)

28. Where the contract of insurance against accident provides, upon condition of forfeiting all claim, that full particulars of the accident and injury shall be furnished to the insurer, without suppression of any material fact, a failure to disclose injuries happening subsequently to the accident, by which the original injury is aggravated, is not the suppression of a fact within the meaning of the contract. (*Id.*)
29. In an action on an accident insurance for one day, by which the insurer agreed to be liable for loss of time from accident and injury, which totally disabled and prevented from all kinds of business, it was shown that after an accident on the day named the insured was, for a time, able to work, but became totally disabled some days later on receiving additional injuries, which aggravated the injury originally received, and it did not appear that the original injury would have produced total disability to labor:
Held, that the insurer was not liable. (*Id.*)
30. Possession of insured property by the sheriff, taken through a levy under execution against the insured, will not absolve the latter from a warranty in his policy that he will keep a watchman in the premises at night. (*First National Bank of Ballston Spa agt. Insurance Co. of North America*, 5 Lansing, 203.)
31. In an action upon a policy of insurance which contained a condition that the insured should, within ten days after any loss, deliver a particular account thereof, signed by him and verified, to the company, evidence of language of a general agent of such company, who had power to bind it, used to the insured, within ten days after a loss has occurred, calculated to induce the insured to postpone the preparation and forwarding of such proof until after the ten days has expired, is, *it seems*, sufficient to support a finding of a waiver by the company of the condition within the time required for its fulfillment. (*Dohn agt. Farmers' Joint Stock Insurance Co.*, 5 Lansing, 275.)
32. The rejection of the claim of the insured by the company, made after the time prescribed by the policy for furnishing the proofs of loss has expired,

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upon other grounds than that the proofs were not furnished within the required time, is a sufficient waiver by the company of the non-fulfillment of such a condition, and no new consideration is required to support such waiver. (*Id.*)

33. A condition of the policy required that the application must, if the applicant had any less estate than a fee in the property to be insured, state the nature of such estate:

Held, that inasmuch as no question as to the nature of the title of the applicant was included in the written form of application furnished by the company, they were liable upon such policy, although the title held by the insured was, in fact, an equitable one only, under a contract of sale upon which a payment had been made, and this fact was not stated by the insured at the time of the application. (*Id.*)

34. A statement by such applicant that he is the owner of the property to be insured, to which he has, in fact, only an equitable title, under a contract of sale upon which a payment had been made, is not such a misrepresentation as avoids the policy. (*Id.*)

35. If a member of a firm which has an agency to take risks, &c., for an insurance company dies, the authority of its surviving members to incur new liability for the company ceases. (*Martine agt. International Life Assurance Co. of London, 5 Lansing, 535.*)

36. And where a firm of insurance agents, having authority from a life insurance company, was accustomed to receive payments of the premium upon a policy of insurance issued by the company:

Held, that the death of one of the firm terminated the authority of the surviving member, and that he was not authorized to receive further payments either as a survivor or individually. (*Id.*)

37. *Held*, further, that the insured, on taking receipts from the remaining member of the firm in the latter's name, as survivor, &c., became charged with notice of the termination of the agency, and there being no evidence of ratification by the company, that the payment of premiums to the surviving member did not charge the company. (*Id.*)

38. Where the application upon which a policy of life insurance is issued is made for the benefit of the person ap-

plying, and becomes part of the policy, and the policy recites the payment of the consideration by the applicant, and the agreement is to pay "the assured," the insurance is, it seems, for the benefit of the applicant. (*Smith agt. Aetna Life Insurance Co., 5 Lansing, 545.*)

39. And in such case, it seems, the "assured" is the party paying the consideration, and asking for the insurance for his benefit. (*Id.*)

40. It seems, in furnishing preliminary proofs the person claiming the insurance under a policy which agrees to pay after due proof and notice of the death, is not obliged to furnish proof of his insurable interest. (*Id.*)

41. And if necessary to furnish such proof, a defect in that respect is waived by the insurer if he retains the proof furnished without objection. (*Id.*)

42. Concealment or misrepresentation by an applicant for life insurance of symptoms of a serious and dangerous disease, in answering questions proposed to him by the insurer, which he agrees and professes to answer truly, making his answers part of the policy, avoid the policy, even although the insurer's examining physician examines the applicant and reports favorably upon the matters questioned upon. (*Id.*)

INTEMPERANCE.

See INSURANCE. (5 Lansing.)

INTENTION.

1. Although it is now well settled that where the character of the transaction depends upon the intent of a party to a contract, it is competent, when that party is a witness, to inquire of him what his intention was, the rule does not apply to a case where the question is not one of intent, but whether the witness was defrauded, by being induced to execute a lease, as surety for the tenant, for a term of two years, instead of one, as he supposed it to be. (*Learned agt. Ryder, 61 Barb., 522.*)

2. In such a case, after the witness has testified that he agreed to be surety only for one year, it is improper to ask him whether he would have signed as surety if he had known that by the lease, as drawn, he would have become surety for two years. (*Id.*)

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INTEREST.

1. The defendant subscribed to the capital stock of a railroad company, the amount of the subscription to be paid "in such installments, and at such times, as the board of directors might lawfully direct." Several calls were made by the directors, amounting, in the aggregate, to the precise sum subscribed, which were all paid by the defendant, but not at the times designated for payment in the respective calls, and receipts given. Nothing was said about interest, and no claim made for it, until several months after the whole principal had been paid. *Held* that an action would not lie to recover interest on the several amounts specified in the calls, during the time they remained unpaid after the day designated for payment by the call. (*The Southern Central Railroad Co. agt. Town of Moravia*, 61 Barb., 180.)
2. When there is no agreement to pay interest, interest, when allowable, is allowed not as a part of the contract, but as an incident, and by way of damages for the default, to make the creditor good for the loss he has sustained by reason of the breach or default. (*Id.*)

INTERPLEADER.

See BAILMENT. (48 N. Y.)

J.

JOINT OBLIGORS.

1. Where an administrator's bond is assigned by the surrogate for the purpose of being prosecuted under the act of 1837, the action may be brought in the name of the assignee as the real party in interest, under § 111 of the Code. If sued in the name of the people, as the nominal obligees, the Code, under § 113, allows the action to be brought in that form. (*Cridler agt. Curry, ante*, 345.)
2. Before the Code, joint and several obligors must have been sued either all jointly, or each one severally. But under § 120 of the Code, all or any of the obligors be included in the same action. (*Id.*)
3. Therefore, where the plaintiff sued only two of the four sureties to the administrators' bond, *held* that the action was authorized by § 120 of the Code.

JOINT PLAINTIFFS.

See PARTIES. (48 N. Y.)

JUDGMENTS.

1. A judgment in an action, where the court rendering it has jurisdiction of the parties and the subject-matter, is final, until, in some of the modes of review known to the law, it has been reversed; the decision of the court ordering the judgment cannot be reviewed upon motion to set it aside. (*Fisher agt. Hepburn*, 48 N. Y., 41.)
2. A party who has appeared and litigated the action cannot move to set aside the judgment, upon the ground that such an action cannot be maintained. If he made no objection to the sufficiency of the complaint, and litigated the cause upon the merits, he would be bound by the judgment. If he raised the objection, it would be the duty of the court to decide it, and if the court erred, the only mode of review known to the law is by appeal from the judgment or a motion for a new trial upon a case or bill of exceptions. (*Id.*)
3. A judgment creditor has a mere general, not a specific lien upon the debtor's real estate; he cannot therefore maintain an action for waste committed thereon. (*Lansing agt. Carpenter*, 48 N. Y., 408.)
4. Parties cannot, by agreement, convert a judgment into a personal mortgage or a bill of sale, or give to it any greater effect than the law gives to it. A parol agreement, therefore, that a judgment shall be a lien upon all the debtor's personal property, will not be enforced in equity, even as against subsequent assignees who assented to the arrangement. (*EARL, C.*) (*Id.*)
5. It was agreed between a debtor and his creditors that he should give the latter security for their respective claims by confessing judgment, the judgment in favor of one creditor to be first entered and to have priority of lien upon all the property, real and personal, of the debtor. The judgments were entered in Schuylar county, as agreed, all parties supposing that county to be legally organized. It was subsequently decided that Schuylar county was not constitutionally organized, and that the judgment should have been docketed in Steuben. In an action brought by the preferred creditor to establish his equitable lien:

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Held, that, as between the parties, the plaintiff was entitled to the same position that he would have occupied had his judgment been docketed in the proper county; but he was not entitled to a lien upon timber cut upon the debtor's real estate after the docketing of the judgment, and transferred by the latter to the other creditors to be applied upon their judgments before the issuing of execution upon plaintiff's judgment. Also *held* (EARL, C.), that plaintiff had no lien upon the debtor's personal property which had been so transferred prior to the issuing of his execution. (*Id.*)

6. Where, in an action in the nature of a creditor's bill, brought to set aside a conveyance by the judgment debtor, as fraudulent, the plaintiff obtains a verdict and judgment is perfected some months thereafter, the adjudication, so far as relates to the validity of the judgment upon which the creditor's bill was founded, dates from the time the verdict was rendered, and the judgment simply estops the parties from denying that at that time the original judgment was a valid and subsisting one; it is not conclusive that the original judgment was unpaid at the time the judgment in the creditor's suit was perfected. (*Fitzgerald agt. Topping*, 48 N. Y., 438.)

7 Where in an action brought by two plaintiffs, they fail to establish a joint interest, but a separate cause of action in favor of one of the plaintiffs is established, the court has power, under § 274 of the Code, to give judgment in favor of the one and against the other, but it is not bound so to do, and a judgment against both is not erroneous. (*Culkins agt. Smith*, 48 N. Y., 614.)

See Balrock agt. Hermance (Mem.), (48 N. Y., 683).

8. where it appeared upon a motion to set aside a judgment, that it was for an amount exceeding \$2,100; that to that extent, it was upon a demand for which the defendant, upon a settlement with the plaintiffs, had given them his promissory notes, which were not due when the action was commenced; *Held*, that this presented a question of law for trial. That, *prima facie*, this was against the right of the plaintiffs to the judgment, to that extent. (*Rowles agt. Hoare*, 61 Barb., 226.)

9. And that even if the facts sworn to by the plaintiffs, in explanation, could overcome this legal presumption, still

the court would not, at special term, try a cause upon the merits, on affidavits. (*Id.*)

See FORMER SUIT.

JUDGMENT DEBTOR AND CREDITOR.

1. A judgment debtor put the title of his real estate in his wife, and also paid for other real estate conveyed to her, which latter estate she mortgaged *bona fide*. A second judgment was then recovered against the debtor by the judgment creditor, who brought suit in the nature of a creditor's bill against the husband and wife, filed a *lis pendens*, and had a decree declaring the conveyances fraudulent respecting both judgments, and that the property was conveyed subject to the judgments. The wife then mortgaged the property received from her husband, the mortgage foreclosed by action to which the judgment creditor was not party, and the purchaser at the foreclosure sale took an assignment of the two judgments, paying the balance due, and also of the decree in the creditor's suit:

Held, that the assignee of the judgments would be restrained from proceeding to sell the property covered by the second conveyance to the wife, then in the hands of a purchaser at a foreclosure sale under her mortgage thereon, inasmuch as the older judgment did not attach as a lien thereon, the judgment debtor never having had the legal title, and the decree in the creditor's suit could not charge it as a lien thereon prior to the mortgage, as the mortgage was not made party to that suit, and the latter judgment was recovered after the mortgage. (*Reynolds agt. Peck*, 5 Lansing 149.)

See EQUITABLE RELIEF. (5 Lansing.)
PRESUMPTION. (*Id.*)

JUDGMENT LIENS.

See FORECLOSURE. (5 Lansing.)

JUDICIAL PROCEEDING.

See EVIDENCE. (5 Lansing.)

JUDICIARY.

See CONSTITUTIONAL LAW. (5 Lansing.)
COUNTY JUDGE. (*Id.*)

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JURISDICTION.

1. A county judge has power under the Code, to continue on the return of an order to show cause, an injunction order made by himself *ex parte* in an action in the supreme court. (*Hathaway* agt. *Warren*, ante, 161.)
 2. (This is adverse to *Middletown* agt. *Rondout*, &c., *R. R. Co.* at special term, 43 *How.*, 144, affirmed at general term, 43 *How.*, 481.) (*Id.*)
 3. A justice of the peace has no jurisdiction to issue an attachment under the Revised Statutes (2 *R. S.*, 230, § 26) upon affidavits and papers, unless "it shall satisfactorily appear to the justice that such debtor has departed or is about to depart from the county where he last resided, with intent to defraud his creditors, or to avoid the service of any civil process, or that such debtor keeps himself concealed with the like intent." (*Garrison* agt. *Marshall*, ante, 193)
 4. Or if the application is intended to be made under § 34 of the non-imprisonment act of 1831, "it must satisfactorily appear before the justice that the defendant is about to remove from the county any of his property with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete any of his property with the like intent, whether such defendant be a resident of the state or not." (*Id.*)
 5. In this case, the application for the attachment was made upon the grounds that "the said George Woodruff has departed, and is about to remove his property from the said county of Cayuga with the intent to defraud his creditors."
- Held*, that the portion of the application stating that the defendant in the attachment had departed, &c., would bring the case under § 26 of the Revised Statutes; while the latter clause presents a case under § 34 of the non-imprisonment act. (*Id.*)
6. As the application for the attachment was partially made under § 26, it should have been made to appear by the affidavits that the defendant had departed "from the county where he last resided." So also, as it sought to make out a case within the provision of § 34 of the non-imprisonment act, the papers should have shown either that the defendant was a resident of the state, or a non-resident. (*Id.*)
 7. These facts were essential to give the justice jurisdiction to issue the attach-

ment, and without one or the other of them, no case was made out within either section of the several statutes quoted. (*Id.*)

8. The Superior Court of the city of Buffalo has jurisdiction of an action against the board of supervisors of Erie county, where the summons is served upon the chairman or clerk of the board in that city. (*The B. & S. L. R. R. Co.* agt. *Supervisors*, 48 *N. Y.*, 93.)

See ASSESSORS AND ASSESSMENTS. (61 *Barb.*)

CRIMINAL LAW. (*Id.*)

MUNICIPAL CORPORATIONS. (*Id.*)

SHIPS AND SHIPPING. (*Id.*)

9. The rule applicable to all inferior and limited tribunals is, that their jurisdiction is never presumed, but on the contrary must be alleged and proved. When the jurisdiction of the court or officer is made to depend on the return of process in a given form, or proof of a particular fact, and the return is not substantially in the form prescribed, or the fact is not proved, the court or officer does not acquire jurisdiction, and the proceedings are utterly void. (*Stone* agt. *Miller*, 62 *Barb.*, 430.)
 10. It is a universal rule that when the defendant, in any proceedings, has never appeared, and there is a defect in jurisdiction, it is fatal, and can be taken advantage of by any person interested in, or affected by, them. *Per MULLIN, J.* (*Id.*)
 11. If a court has jurisdiction of the subject matter, voluntary appearance completes the jurisdiction, and authorizes any decree or judgment which the court may make. (*Everts* agt. *Everts*, 62 *Barb.*, 577.)
- See APPEAL. (62 *Barb.*)
- JUSTICES OF THE PEACE. (*Id.*)
- CONSTITUTIONAL LAW. (*Id.*)
12. Upon a sworn complaint, in writing, charging that (plaintiff) "of, &c., and keeper of a saloon in the town of C., is a disorderly person by allowing drunkenness and gambling in his saloon by men and boys, contrary." &c., a warrant was issued by a justice of the peace, reciting the accusation in the words of the complaint and directing plaintiff's arrest as a disorderly person:
- Held*, that it was a sufficient protection to parties acting under it, inasmuch as the complaint stated facts from which the justice might have concluded that the plaintiff had committed an offense under the statute (1 *R. S.*, 638), which

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provides that all "keepers of houses for the resort of drunkards, tipplers or gamblers * * * shall be deemed disorderly persons," and was, therefore, sufficient to give the justice jurisdiction. (*Gardner agt. Bain*, 5 *Lansing*, 256.)

See ARREST. (5 *Lansing*.)
 JUSTICE OF THE PEACE. (*Id.*)
 JUSTICES' COURT. (*Id.*)
 PLEADING. (*Id.*)
 RAILROAD MUNICIPAL BONDS.
 (*Id.*)
 SURROGATE. (*Id.*)

JURY AND JURY TRIAL.

See JUSTICES' COURT. (*Id.*)
 PRACTICE. (*Id.*)
 CRIMINAL LAW. (5 *Lansing*.)
 PRACTICE. (*Id.*)

JUSTICES' COURT

See COSTS. (48 *N. Y.*)

1. A justice of the peace has the right to allow an amendment of the complaint, on the trial of an action before him, by reducing the amount of damages claimed therein below fifty dollars; although the effect of such an amendment will be to deprive the defendant of a right to a new trial in the county court. (*Jaycox agt. Pinney*, 51 *Barb.*, 344.)
2. The amendment of section 53 of the Code, in 1861, by extending the jurisdiction of justices of the peace to actions of replevin, is not void as violating the provisions of the constitution which declares that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever," (art. 1, § 2.) by reason of the circumstance that it transfers a class of cases from courts of record, where juries are composed of twelve men, to justice's courts in which they consist of six, only. *MULLIN*, P. J., dissented. (*Knight agt. Campbell*, 61 *Barb.*, 16.)
3. The circumstance that although all three of our State constitutions have contained similar provisions to that contained in article 1, section 2, of the constitution of 1846, it has been the common practice for the legislatures, under each and all, to exercise the power of altering and enlarging the jurisdiction of these inferior tribunals, and authorizing them to try actions, and classes, or kinds of action, with a jury of six men, which before were triable only in a court of record, by a jury of twelve men—showing a gen-

eral acquiescence in the exercise of the power for so long a period—is one of great weight, in favor of its constitutionality; and one which ought to be conclusive, as to the true construction and meaning of such constitutional provision. * *Per* *JOHNSON*, J. (*Id.*)

See UNDERTAKING. (61 *Barb.*)
 APPEAL. (62 *Barb.*)
 LEGISLATURE. (*Id.*)

4. Where the justice's return, on appeal to the County Court, stated that "the summons was personally served, the 20th day of May, 1870, on defendant, by W. H. Race, constable. Fees \$1.25:"

Held, the appellate court might infer that the constable so returned. (*Attery agt. Woodbeck*, 5 *Lansing*, 498.)

5. Whether, on such an appeal, other grounds of error may be urged besides those named in the notice of appeal, or which appear from the return to have been raised below, *quere*. (*Id.*)

See JUSTICE OF THE PEACE.
 PRACTICE. (5 *Lansing*.)

JUSTICE OF THE PEACE.

1. A justice of the peace, having two offices, in his town, one at B. and one at H., at which courts were held and summonses made returnable alternately, issued a summons returnable at his office in H., on a day named. The constable, in serving the summons, pretended to read it, or state its contents, to the defendant; according to which statement the process was returnable at the office of the justice in B. The summons was returned personally served. The defendant failing to appear at H., on the return day, a judgment was there rendered against him, in his absence. *Held* that the process was not duly served, and hence the justice never acquired jurisdiction of the person of the defendant. (*Waring agt. McKinley*, 62 *Barb.*, 612.)
2. If process has been defectively served, or not served at all, the defendant cannot come into court and by plea or answer set up such defect or want of service, to defeat the action. The issue to be joined and tried relates to the merits, and not to the practice in the suit. (*Id.*)

See APPEAL. (62 *Barb.*)
 CONSTABLE. (*Id.*)

3. It is, it seems, discretionary with a justice of the peace to grant or refuse an adjournment after an amendment of the pleading, under section 64, subdi-

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vision 11. of the Code. (*Sherar agt. Willis, 5 Lansing, 329.*)

4. And where, at joining issue, the defendant pleaded a general denial, and desired to plead payment, but the justice, with the plaintiff's knowledge, declined receiving the plea, stating that it was covered by the general issue:

Held, that the refusal of the justice, at the trial, on permitting the defendant to amend his answer by pleading payment, to allow an adjournment to the plaintiff, upon affidavit of surprise, absence of witnesses, &c., was not error, for which the judgment would be reversed. (*Id.*)

5. It is sufficient to confer jurisdiction of the defendant upon a justice of the peace, in the case of a summons served by copy only, if the plaintiff appears in person on the return of the summons, and the defendant, by attorney, who does not prove his authority to appear, and issue is joined, and the case adjourned by consent without the plaintiff's requiring proof of the attorney's authority, or objecting to the absence of it. (*Sperry agt. Reynolds, 5 Lansing, 407.*)

6. The statute (2 R. S., 233, § 45) does not make any distinction between the proof required to be made of authority to appear in the case of a summons personally served, and of one served by leaving copy only. In either case, such authority is admitted where the opposite party appears and joins issue without objection to the absence of proof of it. (*Id.*)

See ARREST. (5 Lansing.)

JURISDICTION. (*Id.*)

JUSTICES' COURT. (*Id.*)

PRACTICE. (*Id.*)

JUSTICES' DISTRICT COURTS, N. Y. SALARIES.

1. In an action against the corporation of the City of New York by a justice of a district court of that city for payment of a balance of salary claimed to be due the justice, at the rate of \$10,000 per year, and the answer of the defendants deny that the salary of the plaintiff was fixed at \$10,000 per year, but allege that it was fixed by law at \$5,000 per year, and offer to allow judgment at the latter rate; On demurrer to the answer, the question is, whether the salary of the plaintiff was lawfully fixed at \$10,000 per year or at the lesser sum of \$5,000 (*Quin agt. The Mayor, &c., of N. Y., ante, 266.*)

2. This question is settled in favor of the

plaintiff by showing that on the 31st of December, 1869, the common counsel passed an ordinance fixing the compensation of each of the police justices at \$10,000 per year, and that compensation was thereafter paid to them at that rate, and was so paid when *ch. 383 of the Laws of 1870* was enacted. (*Id.*)

3. The latter enactment reads as follows "The mayor and comptroller are hereby authorized to fix the salaries of the civil justices of the city of New York, or any or either of them, as they may deem the legal business of the respective districts to justify, not exceeding the salary now paid to the police justices of said city. (*Id.*)

4. It is in vain to assert that the salary of the police justices had been unlawfully fixed at \$10,000 per year. That is not the question; but rather what was the sum then paid as such salary. (*Id.*)

5. On the 21st of October, 1870, the mayor and comptroller in pursuance of the act of 1870 *ch.*, 383, fixed the salary of the plaintiff as such civil justice at \$10,000 per year, and signed a certificate to authenticate such action. To this salary the plaintiff is entitled. (*Id.*)

6. The second defense set up in the answer was that there was not money in the treasury of the city appropriated or applicable to the plaintiff's claim at the rate of \$10,000 per year. (*Id.*)

7. The defendants rely upon *ch. 583 of the laws of 1871*, as supporting this defense. It is claimed that this act, commonly called the "two per cent act," limits the amount to be raised by the board of supervisors, by taxation for the year 1871, and that the board of apportionment, after providing for the principal and interest of certain bonds and the city's proportion of the state tax, shall apportion the remainder of such aggregate amount "to the various departments and purposes of the city and county governments" and that from the sum so raised, all the expenses of the city and county for all their departments and purposes shall be paid, and no liabilities shall be incurred for any purpose in excess of such amount (§ 1-3). (*Id.*)

8. That by said act the board of apportionment has power to regulate the salaries of officers and employees of the city and county governments (§ 3). (*Id.*)

9. Also the 5th section of the same act is relied on which provides that "no

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liability for any purpose whatsoever shall thereafter be incurred by any department of the city of New York or officers of the county of New York exceeding in amount the appropriation made for such purpose; nor shall the City and County of New York be held liable for any indebtedness so incurred.

Held, 1st. that the civil justices are not attached to any of the "departments" of the city government; nor are they officers or employees of any of those departments, but still these civil justices are entitled by law to have their salaries paid by the city.

2d. When *ch.* 583 of the laws of 1871 was passed the salaries of these civil justices were fixed at \$10,000 each per year, and if when the board of apportionment had made the appropriations thereunder for 1871, whether they exhausted all the fund at their disposal or not, they had allowed to the civil justices for their salaries but one-half of what they were entitled to receive, then it is clear that one-half the sums due the justices for their salaries would still be due to them above such appropriations. The act of 1871, was not intended to abrogate existing lawful contracts, or liabilities of the city.

3rd. The city is liable for the plaintiffs salary at the rate of \$10,000 per year, though the board of apportionment has failed to provide for its payment. (*Id.*)

JUSTICE OF THE SUPREME COURT.

See RAILROAD COMPANIES. (61 Barb.)

JUSTICE'S RETURN.

See JUSTICE'S COURT. (5 Lansing)

L.

LACHES.

1. A party coming into a court of equity and asking relief upon the ground of mistake, must show that he has used due diligence and good faith to avoid the consequences of the mistake. He cannot obtain relief where his delay and omission of duty has caused irreparable mischief to the other party. (*Thomas agt. Bartow*, 48 N. Y., 193.)

LANDLORD AND TENANT.

See LEASE. (48 N. Y.)

1 Where a defendant, in an action for rent,

set up as a defense, a surrender of the premises, and acceptance by the plaintiff, and the evidence showed a surrender on the 30th of November; that the cause of action for that quarter accrued on the 1st, and the action was commenced on the 6th of the same month; *Held* that there having been no surrender before the suit was commenced, that defense was not admissible, under the answer. (*Learned agt. Ryder*, 61 Barb., 552.)

LARCENY.

See TITLE TO CHATTELS. (5 Lansing.)

LEASE.

1. It is the duty of executors and administrators to receive the rents and profits of premises leased to their testator or intestate, accruing after his death, and, to the extent of the rent reserved in the lease, to apply them in payment thereof, instead of placing them among the general assets; and they are personally liable for the rent, to the extent of the rents and profits received by them. *Prima facie*, these are sufficient to pay the whole rent: if not, it is a matter of defense. (*Miller agt. Knox*, 48 N. Y., 232.)
2. A landlord may collect the rents, accruing after the death of his tenant, of the estate of the deceased, or of the executors or administrators personally, to the extent of the rents and profits of the premises received by them, and the balance, if any, of the estate. (*Id.*)
See *Pike agt. Walter* (Mem.), (48 N. Y., 681).
3. The defendants, being lessees of a certain building, occupied the two lower floors thereof, and the plaintiffs occupied, under them, the lofts over the stores. The lease to the defendants being about to expire, a verbal agreement was made, between the parties, that the defendants should obtain a new lease of the premises, from the owner, at the lowest possible rent, for a term of years, and divide the rent, with the plaintiffs, and sub-let to them the lofts, at an annual rent of one-half the amount required to be paid for the whole building. The complaint alleged that the defendants subsequently obtained a new lease of the entire premises, from the owner, for three years, at an annual rent of \$17,000. That they concealed from the plaintiffs the true terms and conditions of such lease, and falsely represented to

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them that they were obliged to pay a rent of \$19,000 per annum; by means of which false representations the plaintiffs were induced to sign a lease for a larger sum than one-half of the actual rent of the whole building viz: for \$9500 a year. The prayer was that the lease so obtained from the plaintiffs might be reformed, so that the plaintiffs should not be obliged, by the terms thereof, to pay more than \$3500 a year. *Held*, that if the statements in the complaint were true, the facts were sufficient to warrant the court in reforming the lease; or, at any rate, in relieving the plaintiffs from the obligation to pay more than one-half of the entire rent. (*Kirtland* agt. *Schanck*, 61 *Barb*, 348.)

4. *Held*, also, that the statute of frauds was not applicable to the case. That the allegation being that the lease was obtained by fraudulent representations, and was executed under misstatements of the defendants, the parol agreement was sufficient to sustain the action. (*Id.*)

See CORPORATION. (61 *Barb.*)
PARTNERSHIP. (*Id.*)

5. A lease, of a farm, contained the following provision: "It is agreed that the said [lessor] shall have a lien, as security for the payment of the rent aforesaid, on all goods, implements, stock, fixtures, tools and other personal property which may be put on said premises, and such lien to be enforced, on the non-payment of the rent aforesaid, by the taking and sale of such property, in the same manner as in cases of chattel mortgage on default thereof." *Held* that this clause did not constitute a bargain and sale of the lessee's property, by way of mortgage or otherwise: there being no words of sale, assignment or transfer; and the design being that the title should remain in the lessee. (*McCaffrey* agt. *Wooden*, 62 *Barb.*, 316.)

6. *Held*, also, that the provision was not a chattel mortgage upon the property therein specified or referred to; nor did it create a lien thereon, in the eye of the law, *in presenti*, in favor of the lessor. (*Id.*)

7. *Held*, further, that such provision was nothing more nor less than that the lessor should have a lien by way of security in future, whenever rent became due and remained unpaid. That it was an agreement to give a lien, but did not create one. (*Id.*)

8. A lease for lives contained a condition

that if the tenant committed waste the lease should become forfeited. The tenant mortgaged his interest in the land, and then committed waste; the landlord, upon ascertaining this fact, demanded possession of the lands, which the tenant surrendered, and the landlord executed a new lease of the premises to another tenant, who went into possession under it:

Held, that as against the mortgage previously given by the tenant and parties claiming under it, the surrender did not terminate the lease. (*Allen* agt. *Brown*, 5 *Lansing*, 280.)

9. As against such mortgage, and even as between the landlord and tenant, it seems, a re-entry for the forfeiture by suit at law was necessary in order to terminate the lease. (*Id.*)

See EVIDENCE. (5 *Lansing*.)
REFLEVIN. (*Id.*)

LEGACY.

See DEVISE. (5 *Lansing*.)
EVIDENCE. (*Id.*)

LEGISLATIVE BODY.

See MUNICIPAL CORPORATION. (5 *Lansing*.)

LEGISLATIVE POWER.

See CONSTITUTIONAL LAW. (5 *Lansing*.)

LEGISLATURE.

1. The power of the legislature is general and unlimited, as to all subjects of legislation; except in the cases where it has been abridged by the constitution of the State, or of the United States. (*Knight* agt. *Campbell*, 62 *Barb.*, 16.)
2. Hence its power to enlarge the jurisdiction of justices' courts is unquestionable; unless the power is restricted by some constitutional limitation upon it. (*Id.*)

LEVY:

1. A sheriff having returned a warrant of attachment as "merged in execution," and also having returned the execution, *nulla bona*, is concluded by such returns, and has no further rights or powers by virtue of having had the attachment. His powers terminated with the return of the process.

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An alias execution subsequently issued, could not revive them. (*Clarke* agt. *Goodridge*, ante, 226.)

2. The sheriff served a copy of an attachment on the Bank of the Republic, with a notice showing that he levied on "the bank account of the defendant, Goodridge, and any debt due or owing from the bank to him." At the time of this levy nothing was owing to Goodridge from the bank, and nothing remained to his credit in the bank account; but certain stocks of Goodridge were in pledge to the bank for loans, which stocks at the time were worth no more than the bank had loaned upon them. Subsequently an advance in stocks enabled the bank to sell them, so as to realize a balance which was passed to the credit of Goodridge in the bank account. After such sale no further levy was made by the sheriff, but instead thereof he had returned the process. *Held*, that the debt had not been attached, as it was not in existence at the time of the levy; and as no levy was made after, it was a subsisting debt. (*Id.*)

3. The notice served by the sheriff, was a sufficient compliance with § 235 of the code. Per *DANIELS* and *JAMES*, JJ. (*Id.*)

4. The sufficiency of the notice was not in question in the case. Per *GROVER* and *LOTT*, JJ. (*Id.*)

5. The notice was insufficient. *HUNT*, Ch. J. (*Id.*)

6. A receiver in supplementary proceedings in *Clarke's* action, having become vested with all the personal estate of the judgment debtor, including debts owing to him (*Code*, § 298), at a time when no process was in the sheriff's hands, it was *held*, that the receiver was entitled to the property. (*Id.*)

LIBEL.

1. In construing a publication alleged to be libelous, the scope and object of the whole article is to be considered, and such a construction put upon its language as would naturally be given to it. The test is, whether in the mind of an intelligent man the terms of the article and the language used import a criminal or disgraceful charge. (*More* agt. *Bennett*, 48 N. Y., 472.)

2. Extrinsic averments are not necessary where the words used, giving them their natural construction, tend to injure the reputation of the subject, and expose him to hatred, contempt or ridicule. (*Id.*)

3. The complaint in this action charged, in substance, that defendant published an article wherein the writer, after stating that a certain woman was a prostitute, alleged that, as he understood, she was under the patronage or protection of the plaintiff. The complaint alleged that this charge was false and malicious, and tended to blacken and injure plaintiff's reputation, and expose him to public contempt. Plaintiff was non-suited upon the ground that the complaint did not state a cause of action, as it contained no averment that the publication intended to charge that the prostitute was under plaintiff's protection for illicit purposes.

Held, error; that the intent to charge a criminal patronage or protection was manifest in the publication. The complaint was sufficient, therefore, without such averments. (*Id.*)

LICENSE.

See *GRANT*. (62 Barb.)

LIEN.

1. Sections 292 and 294 of the Code furnish a substitute for the creditor's bill, as formerly used. The service of the order, under those sections, takes the place of the commencement of a suit under the old system, and gives the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of the debtor. (*Lynch* agt. *Johnson*, 48 N. Y., 27.)

2. A final order of a judge, in proceedings under section 294, requiring the debtor of a defendant to pay his debt to the plaintiff, renders this lien effectual; and payment, or liability to pay, in pursuance of such order, is a defence to the debtor in an action against him by his creditor, or by an assignee who is not shown to be a bona fide purchaser for value of the claim, prior to the accruing of the lien. (*Id.*)

See *CONSTRUCTIVE NOTICE*. (48 N. Y.)
PARTITION. (*Id.*)

3. The mere assertion, unaccompanied by any other act, of a lien greater in amount than the lienor is entitled to, will not obviate the necessity of a tender; for it may be that the right amount would be accepted; but when there is an absolute refusal to deliver up property unless a claim to which the party is not entitled is discharged, then the law dispenses with the idle ceremony of making a tender which the

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claimant in advance declares he will not accept, and an action may be brought immediately. (*Hoyt* agt. *Sprague*, 61 *Barb.*, 497.)

4. Where a carrier of grain refused, absolutely, to deliver the grain to the consignee, unless the full amount of freight was paid, without any deduction for damages or short delivery; *Held*, that the payment of the freight, and the delivery of the grain were to be concurrent in point of time, and the carrier had no right to say that he would retain the goods until he received a sum he was not entitled to. (*Id.*)

5. A lien upon personal property, whether arising by operation of law, or from express contract, is a right of detaining the property of another, until some claim is satisfied; and cannot exist without possession of the property in the person making the claim. (*McCaffrey* agt. *Wooden*, 62 *Barb.*, 316.)

6. The lien of a shipwright upon a boat of which he has possession, for repairs made thereto for the owner, which were required to put it in a navigable condition, is prior to, and may be forced as against, that of a mortgagee thereof, whose mortgage has been made and duly filed pursuant to statute and become due prior to the making of such repairs, although he has never taken possession thereunder, such lien being given by law, and not by agreement with the mortgagor. (*Scott* agt. *Delahunt*, 5 *Lansing*, 372.)

7. The decision in *Bissell* agt. *Pearce* (28 *N. Y.*, 252) only applies to cases in which the lien is given by agreement between the owner and lienor, and not where the lien is given by law. (*Id.*)

8. The fact that the mortgagee had knowledge that the repairs were being made, and did not notify the party making them of his claim under the mortgage, or object to their being made, would estop him from asserting his title under the mortgage in opposition to the lien. (*Id.*)

See INSURANCE. (5 *Lansing*.)
MECHANICS' LIEN. (*Id.*)
TENDER. (*Id.*)

LIMITATION OF ACTIONS.

1. The inclination of the courts is not to go beyond the strict letter of the statute, in presuming from mere lapse of time an extinguishment of a sealed obligation to pay. (*GRAY, C.*) (*Central Bank* agt. *Heydorn*, 48 *N. Y.*, 260.)

2. As under the provisions of the "Act to provide for the incorporation of companies to construct plank-roads," etc. (chap. 210, Laws of 1847), in order to enforce the personal liability given by said act (§ 44) against stockholders, provision is made that a joint action may be prosecuted against the company and any one or more stockholders liable to contribute to the payment of its debts; the moment a cause of action accrues against the company it accrues against each stockholder liable, and as to them the statute of limitations begins to run. If therefore an action against a stockholder is not commenced within the period prescribed by the statute of limitations, it is barred. (*EARL, C.*, dissenting.) (*Corklin* agt. *Furman*, 48 *N. Y.*, 527.)

LIMITATIONS, STATUTE OF.

1. The time, within which actions for the recovery of real property must be brought, is governed by chapter II. of the Code, and not by chapter III., which relates to "actions other than for the recovery of real property." (*Marvin* agt. *Lewis*, 61 *Barb.*, 49.)

2. A cause of action to recover damages for fraudulent representations made upon a sale of real estate, in regard to incumbrances, accrues the moment the bargain is completed by the conveyance of the premises to the purchaser; and unless an action is brought within six years from that time, it will be barred by the statute of limitations. (*Northrop* agt. *Hill*, 61 *Barb.*, 136.)

3. It is of no consequence, whatever, that the purchaser did not discover the fraud within the six years. Even though the vendor, or his agent, conceals the defect of title, that will not prevent the statute from running. (*Id.*)

4. A partial payment upon a promissory note past due, by the administratrix of one of the makers, a portion of which payment is from assets of the estate, if made before the statute of limitations has run against the note, saves the obligation from the operation of the statute up to that time. And this, although the payment was the act of one or two administrators alone, without the consent of the other. (*Heash* agt. *Grenell*, 61 *Barb.*, 190.)

5. *Aliter*, where the payment is made after the statute has run against the note. In that case, the question of the right of one administrator to revive and restore a stale demand would arise; and it seems such a demand cannot be revived either by the promise or the

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act, of payment of one of several administrators. (*Id.*)

6. An administratrix making a payment upon a note after the statute of limitations has run against it, not out of the assets of the estate, but out of her own funds, will not be deemed as acting in her capacity of administratrix, even though she directs the payment to be made upon that specific debt; nor can such payment be construed into a promise, or as indicating an intention, to revive, or continue, the demand against the estate. (*Id.*)

See PLEDGE. (61 Barb.)

LIS PENDENS.

See NOTICE OF SUITS PENDING. (48 N. Y.)

LOAN COMMISSIONERS.

See Stackpole agt. Robbins (Mem.), (48 N. Y., 665).

M.

MALICIOUS PROSECUTION.

1. An action lies for malicious prosecution against one who falsely and maliciously accuses another of acts which he believes constitute a crime, and thereby procures his indictment and trial for such crime, although the charge made does not constitute the crime alleged, or any criminal offense. (*Dennis agt. Ryan*, 5 Lansing, 350.)

MANDAMUS.

1. Where the relator's newspaper was designated and selected by the mayor and comptroller of the city of New York, in 1868, under the laws of 1868, as one of the journals wherein the proceedings of the common council and the notices of its committees should be published; and, in 1870, other newspapers, of which the relator's was not one, were designated by the same officers under the act of that year, and it was declared by that act to be unlawful to pay any money for advertising thereafter made for or on account of the corporation, except to such newspapers (*Laws*, 1870, ch. 383); and no designations were made under this act, and the power thereby conferred remained unexecuted.

Held, that a mandamus would lie to compel the defendants to audit and

allow the bills of the relator for advertising done in 1870, after the passage of chapter 383 of the laws of that year, and solely under the authority of the designation of his newspaper in December, 1868, there never having been any notice, either express or implied of the revocation of the original appointment of his newspaper. (*The People agt. Green*, ante, 201.)

2. A teacher of common schools, who claims, under a regular appointment, a salary due her for such services, cannot have a mandamus to compel the inspectors of common schools to examine and audit such salary. She has a remedy at law if she holds under a legal appointment. (*The People agt. The inspectors of Common Schools*, ante, 321.)

See CORPORATION. (61 Barb.)

3. It is a general, if not a universal, rule, that a writ of mandamus will not be granted where other adequate legal remedies exist. (*The People, ex rel. Johnson agt. Martin*, 62 Barb., 570.)

4. The writ is substantially defective, when better remedies are given by action. (*Id.*)

5. The act of the legislature, of 1866, "to amend the Revised Statutes in relation to the duties of supervisors," (*Laws* of 1866, ch. 534.) furnishes a complete and effectual remedy to a town against a supervisor who shall neglect to account, or shall render a false account, or convert to his own use money or securities of the town, by an action against him, brought in the name of the town, by the justices of the peace and town clerk. In addition to this, the town has a remedy upon the official bond of the supervisor. Hence a mandamus will not lie to compel a supervisor to meet and account with the justices and town clerk, under the provisions of the Revised Statutes. (1 R. S. 349, § 4.) (*Id.*)

6. The writ of mandamus is not one of the remedies given by the act of 1866. The act declares that whatever action or proceeding is instituted must be in the name of the town; and this language cannot embrace the writ of mandamus, which must, in all cases, run in the name of the people. (*Id.*)

MARRIAGE.

1. Where a marriage was solemnized in England, between parties who were citizens of that country, at the time: Held that the rights of the husband in

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the property of the wife, at and after the marriage, were regulated by the common law. (*Stokes* agt. *Macken*, 62 Barb., 145.)

2. And that, upon such marriage, the husband became the owner of the property then owned by the wife; and although he may have permitted her to retain possession of it, or to invest it in trade, or in other property, his right to the property, or that into which it had been converted by the wife as his agent, still continued, and was the subject of levy and sale on execution issued against him. (*Id.*)
3. Proof of actual marriage is only required in prosecutions for bigamy and in actions for crim. con. (*Rockwell* agt. *Tunicliff*, 62 Barb., 408.)
4. In other cases, a marriage may be proved from cohabitation, reputation, acknowledgment of the parties, reception in the family and other circumstances from which a marriage may be inferred. (*Id.*)
5. This general rule of evidence is not affected by the act of the legislature altering the law as to the competency of witnesses, by allowing parties to actions to be witnesses in their own behalf, and thus permitting a female defendant to prove, by her own testimony, that she is a married woman. (*Id.*)

MARRIAGE BROKERAGE.

See AGREEMENT. (62 Barb.)

MARRIED WOMEN.

1. Under the provisions of the act of 1860, concerning the rights and liabilities of husband and wife (Laws of 1860, chap. 40), as amended in 1862 (Laws of 1862, chap. 172), the paraphernalia of a wife, given her by her husband, which prior to those statutes was her separate estate in equity, became clothed with all the incidents of a legal estate; and, for an injury to or conversion thereof, she is the proper person to bring suit. (*Rawson* agt. *Pa. R. R. Co.*, 48 N. Y., 212.)
2. As coverture does not prevent the acquisition of property by a married woman, the fact of coverture does not affect the title to stock transferred by her; and where the stock stands in her name the certificate is evidence of its absolute ownership by her; and in case there is nothing in it or connected with it indicating a trust in favor of another person, one loaning money

upon pledge of the stock as security is warranted in making the loan upon the assumption of such ownership; he is not bound to inquire and ascertain how she obtained it. (*Leitch* agt. *Wells*, 48 N. Y., 585.)

See *Schott* agt. *Schwartz* (Mem.), (48 N. Y., 666.)

3. The provision in section 2 of the act of the legislature, of 1860, (Laws of 1860, ch. 90,) authorizing a married woman "to carry on any trade or business and perform any labor or services on her sole and separate account" and declaring that "the earnings of any married woman from her trade, business, labor or services, shall be her sole and separate property," necessarily includes the right, on the part of a married woman, to make valid bargains for her labor or services, before they are performed. (*Adams* agt. *Honness*, 62 Barb., 326.)

See HUSBAND AND WIFE. (62 Barb.)

MASTER AND SERVANT.

1. The rule in regard to the liability of employers to their employes for negligence in retaining incompetent fellow-employes, of whose incompetency they know or should know, discussed, and its limits explained. (*Baulec* agt. *New York and Harlem R. R. Co.*, 5 Lansing, 436.)

See EVIDENCE. (5 Lansing.)

MECHANIC'S LIENS.

1. The act of March 27th, 1871, providing for the extension of mechanic's liens, &c. being remedial, was passed for the purpose of extending the time for the enforcing the lien when proceedings were commenced within the year; and where the lien existed at the time the statute took effect, held, that the act applied to such proceeding. (*Trim* agt. *Willoughby*, ante, 189.)

See EQUITABLE ASSIGNMENT. (61 Barb.)

2. The amendment of 1869 (Sess. Laws, vol. 2, 1355) to the mechanics' lien law (Laws 1854, 1807, sec. 4), requiring notice of the lien to be filed with the county clerk, applied to claims for materials furnished before its passage. (*Moore* agt. *Mansert*, 5 Lansing, 173.)

MILITARY SERVICE.

See INSURANCE, LIFE. (48 N. Y.)

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MISTAKE.

1. Plaintiff purchased and paid for certain real estate, directing the vendor to execute to her a deed conveying the same to her, with a proviso therein that if her son should pay her \$200 per year during her life, he should have the property after her death. By mistake, the deed was so drawn as to grant the land to her in trust for her son, upon certain conditions, not being a trust recognized by the statute of uses and trusts. Plaintiff received the deed without examination, and did not discover the mistake for several months thereafter. When she did discover it, with the concurrence of her son, who refused to take under the deed, she returned it to her grantor, when the same was destroyed, and a new deed was executed and delivered to her, conveying the premises in fee; subsequently the premises were levied upon, advertised and sold, under an execution against the son. The purchaser at the sheriff's sale claimed that the son had the title to the premises or an interest therein, which he had purchased, and this he threatened to enforce.

Held, that there was not a valid and effectual delivery and acceptance of the first deed, so as to pass the title; that the son had no interest in the premises, and that an action to quiet the title could be maintained. (*Fonda* agt. *Sage*, 48 N. Y., 173.)

2. Even if there was such a delivery: the mistake could not be corrected without the aid of the court, the plaintiff remained the equitable owner, with rights superior to the purchaser at the sheriff's sale; and with all the necessary parties before it, the court could, in an action brought to quiet the title, establish plaintiff's title under the second deed, and annul any claim of title under the first. (*Id.*)

3. Where there is a mistake, whether of law or of fact, in reducing an agreement to form or in carrying it into effect, equity will grant relief; but where the parties adopt the security which is to be used to effectuate their intention, if the security should fail, from ignorance of the law, or from any other cause, to operate as the parties intended, the courts cannot substitute any other security for the one adopted. (*Lanning* agt. *Carpenter*, 48 N. Y., 408.)

4. Where parties, to carry out their contract, agree to use an instrument

which, by their mistake of the law, will not effectuate their intention, equity will not reform the instrument or substitute another; but where parties intending to reduce a parol agreement to writing, and because they are ignorant of the force of language, and misunderstand the meaning of the terms used, make a contract different from that designed, equity will grant relief by reforming the instrument and compelling the parties to execute and perform their agreement as they made it. It matters not whether such a mistake be called one of law or of fact. (*Pitcher* agt. *Hennessey*, 48 N. Y., 415.)

5. An equitable defense of this nature can be litigated upon a jury trial. (*Id.*)

See ESTOPPEL. (48 N. Y.)

PLEADING. (*Id.*)

ACTION. (5 *Lansing*.)

EVIDENCE. (*Id.*)

RESCISSION OF CONTRACT. (*Id.*)

MONEY RECEIVED.

See ACTION. (5 *Lansing*.)

TITLE TO CHATTELS. (*Id.*)

MORTGAGE.

1. A mortgage of property which contains no covenant or promise to pay the money secured by it, nor any express acknowledgement of indebtedness by the mortgagor, creates no personal liability. (*Coleman* agt. *Van Hensselaer*, ante, 368.)

2. It is enough to establish a personal liability against the mortgagor if the mortgage contain an admission of indebtedness on his part, then a promise will be implied and a legal liability created. (*Id.*)

3. But all the cases held, however, that to create a personal liability by implication, the admission of indebtedness contained in the instrument must be express and unequivocal. It is only from such an admission that a promise will be implied. (*Id.*)

4. The recital in an ordinary mortgage, "that the party of the first part, in consideration of the sum of five hundred dollars to him duly paid, has granted, bargained, sold, conveyed," &c., is not an admission of indebtedness from which a promise to pay the sum secured would be implied, hence no personal liability against the mortgagor was created thereby. (*Id.*)

5. The judge also erred in submitting to

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the jury the question whether the defendants were in *possession* of the pier when the accident occurred. The only evidence to support the submission of this inquiry was that the lease was executed some months after it was dated, and that the defendants' agent entered upon the pier and made repairs upon it a few months after it broke down. It was also in evidence, and undisputed, that the lessees were in the possession at the date of the lease, and from thence until it fell. (*Id.*)

See **FIXTURES.** (48 N. Y.)

FORECLOSURE.

PAYMENT.

Bush agt. *Rochester City Bank* (Mem.), (*Id.*)

Stuckpole agt. *Robbins* (Mem.), (*Id.*)

5. Where a mortgage, made without consideration, for the purpose of sale, is sold for a sum less than its face, the transaction is usurious, and the mortgage is void in the hands of the mortgagee. (*Vickery* agt. *Dickson*, 62 Barb., 272.)

6. A mortgage having no consideration whatever, as between the parties, except the surrender of a prior mortgage which is usurious and void, is tainted with the usury of the first and cannot be enforced. (*Id.*)

7. The request of a debtor, to a third person, to become a surety for him to his creditor, for a loan, cannot purge a usurious transaction of its usury. (*Id.*)

8. An unacknowledged mortgage is a valid security in the hands of the mortgagee, except as against *bona fide* purchasers or incumbrancers without notice. (*Id.*)

9. Where a party, by motion, seeks relief from a sale of mortgaged premises made by a referee, upon the assumption that a regular judgment existed, under which the referee was duly appointed, and that he had given the requisite and usual notice of sale, and proceeded to offer the premises, thereunder, and executed his deed in pursuance of the sale so made by him, no question as to technical or formal irregularities, required by rule 46 to be specified in a notice of motion arises, and the rule does not apply. (*Kellogg* agt. *Howell*, 62 Barb., 280.)

10. Any person whose rights are injuriously affected by a judgment, or a sale of property under it, may move to set aside the same, although he is not a party to the suit. (*Id.*)

11. No action will lie to set aside a sale of property of the judgment debtor under a judgment. The only remedy is by motion to set aside the judgment. (*Id.*)

12. A sale under a judgment will not be set aside, in the absence of fraud, surprise, or well grounded misapprehension, simply because a higher price can be reasonably anticipated on a resale of the premises. (*Id.*)

13. Where a mortgage, foreclosed under the statute, by its terms, was not to be a security for over \$3000 "at any one time," but in the notice of sale of the land \$4845.35 was claimed to be due at the first publication of such notice; *Held* that the foreclosure proceedings were not rendered void by the claiming of a larger sum as due, in the notice, than was or could have been due, on the mortgage. (*Mowry* agt. *Sanborn*, 62 Barb., 223.)

14. The statute authorizes the foreclosure by advertisement, of any mortgage that contains a power of sale, upon default being made in any condition in said mortgage. (*Id.*)

15. A purchaser at the sale may, in an action of ejectment, be permitted on the trial, to prove positively by witnesses, or by a new affidavit, that the mortgagors resided at the place to which the notice of sale was directed to them, when it was so directed. (*Id.*)

See **GIFT.** (62 Barb.)

MOTION.

1. Where it became the duty of the appellant's attorneys to see that the cause was restored to the calendar of the general term, as part of the conditions upon which they were relieved from a former default—which they did not do; and the respondent's attorney in accordance with that order, finding it omitted from the calendar on the 1st day of the October general term, procured it to be restored, and some days afterwards it was regularly called to a judgment of affirmance by default:

Held that this action was regular, and in consideration of this being a second motion by the appellants to be relieved, it was proper that the court look into the merits presented by the justice's return.

Held, also, that the testimony in the court below warranted the justice, notwithstanding the form of the note, to find that the note was indorsed by the ap-

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pellants for the accommodation of McKenzie, one of the defendants, and for the purpose of enabling him to procure a release of his wagon from the plaintiffs' lien. Under such circumstances their liability as accommodation indorsers is well established by the court of appeals in *Moore* agt. *Cross*, (19 N. Y., 227.) (*Luft* agt. *Graham*, ante, 152.)

2. On a motion for a new trial on the judge's minutes, no costs as for a motion can be allowed. The prevailing party is entitled only to a trial fee for the trial of an issue of fact. (*Muller* agt. *Higgins*, ante, 224.)
3. Where on a motion by defendant to vacate a judgment against him and to discharge him from custody, it is referred to a referee to take proof to ascertain a single question of fact, to wit: whether the summons in the action was ever served on the defendant, and the referee reports, in favor of the defendant, he cannot move for a confirmation of the report until eight days notice of filing the report has been given to the plaintiff, that the latter may file his exceptions to the report, the motion will be denied as premature. (*Riley* agt. *Brown*, ante, 429.)
4. But on a final hearing at special term, after the filing of the report and exceptions taken thereto, the court may allow the plaintiff's motion to set aside the report upon his exceptions, and the defendant's application for confirmation of the report to come on to argument together. (*Id.*)
5. The court has ample power under § 271 of the Code, to direct the determination of a material and controverted question of fact arising upon a motion to be ascertained by a referee. (*Id.*)
6. A judgment in an action, where the court rendering it has jurisdiction of the parties and the subject matter, is final, until, in some of the modes of review known to the law, it has been reversed; the decision of the court ordering the judgment cannot be reviewed upon motion to set it aside. (*Fisher* agt. *Hepburn*, 48 N. Y., 41.)

See APPEAL. (48 N. Y.)

MUNICIPAL CORPORATIONS.

See ASSESSMENT AND TAXATION. (48 N. Y.)

1. Courts of equity have no general supervisory power over the government of municipal corporations, or over the acts and proceedings of their governing

bodies. (*Phelps* agt. *The City of Watertown*, 61 Barb., 121.)

2. It was never the province of a court of equity to interfere, in such cases, between the individual citizen and the municipal authority, except where it is shown by the complaint that the rights of the person prosecuting have been either injured or menaced in a matter falling under some recognized head of equity, and which it is the peculiar province of a court of equity to prevent or redress. *Per* JOHNSON, J. (*Id.*)
3. The power of the legislature to authorize municipal corporations to bond themselves, in aid of railroad corporations, is conclusively settled in this State, by the court of last resort, as well as by the Supreme Court of the United States. (*The People ex rel Doty* agt. *Henshaw*, 61 Barb., 409.)
4. When the assent of the tax-payers of a town, to the issue of bonds by the town, is manifested in the way prescribed by the legislature, it is irrevocable. (*Id.*)
5. If a petitioner may, at any time, withdraw his assent, it must be before the petition has been acted on by the county judge. (*Id.*)
6. After jurisdiction has been conferred upon the county judge, by presenting a petition signed by the requisite number of tax-payers, representing the requisite amount of taxable property, it is too late for petitioners to withdraw their assent. (*Id.*)
7. Where the foundation for an action against a city corporation to recover damages for a personal injury sustained by the plaintiff was, that a piece of ice upon which he slipped and fell was a dangerous obstruction to those using the sidewalk for passing along the street, which the city was bound to remove, and the danger consisted in the liability of those who stepped upon it, to slip and fall; *Held*, that the obstruction was one to be avoided by those using the sidewalk, and seeing, or being able to see, the ice; and that if it could readily be avoided, the failure to avoid it, by one using the sidewalk and plainly seeing the obstruction, must be accounted negligence. (*Darlin* agt. *The City of Troy*, 61 Barb., 438.)
8. *Held*, also, that if there was danger in walking over the piece of ice, and the plaintiff voluntarily and unnecessarily undertook to walk over it, when he could plainly see it, and easily avoid

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it, and fell and broke a limb, he could not meet the allegation that his own negligence contributed to the result; or avoid the conclusion that he must therefore fail to recover damages of the city. *Valenti non fit injuria.* (*Id.*)

9. And it being proved that the plaintiff not only did see the ice, but was warned of it, at the time; *Held*, that he was not in a situation to charge his injury to the default of the city, if the city was in default, and should therefore have been non-suited. (*Id.*)

10. In such a case it is erroneous for the judge to refuse to charge the jury that "if immediately previous to the accident, the plaintiff knew, or had noticed, that there was ice there, and then took the risk of passing over the place safely, he could not recover." (*Id.*)

11. It is well settled that in the case of a village or city where the trustees, or common council, are made commissioners of highways, the corporation is liable for their negligence in not keeping the streets and sidewalks, within the corporate limits, in a condition safe for the use of passengers thereon. (*Mosey agt. The City of Troy*, 61 Barb., 580.)

12. Where, in an action against a city, to recover damages for a personal injury sustained by the plaintiff in slipping and falling upon an icy sidewalk, there was evidence tending to show that the ice was an accumulation from the freezing of water flowing from a house-conductor upon the sidewalk and extending entirely across it; that it had remained there long enough to warrant the jury in attributing negligence to the defendant, for its continuance; and at the time of the accident, it was covered with a light fall of snow, which covered the ice, and concealed it from the plaintiff's view as she attempted to walk over it; *Held*, that the question of negligence on the part of the defendant was, under the evidence properly submitted to the jury. (*Id.*)

13. *Held*, also, that there was no such manifest negligence on the part of the plaintiff as to call for a non-suit; and that that question was also properly left to the jury. (*Id.*)

14. *Held*, further, that upon the subject of the necessity of actual notice of the obstruction being brought home to the defendant, the judge was right in refusing to charge that it was necessary; and that he put the case upon a ground sufficiently favorable to the defendant, in charging, as requested,

"that the defendant was not liable, unless it appeared that the accumulation of ice at the point in question had remained so long as to make the obstruction public and notorious." (*Id.*)

See ACTION. (62 Barb.)

15. The resolution of a corporate or legislative body is not questionable by a third person, because passed upon reconsideration of a negative vote, moved by one who originally voted with the minority. (*People ex rel. Locke agt. Com. Council of City of Rochester*, 5 Lansing, 11.)

16. The Common Council of Rochester is required (Laws 1861, p. 323. §§ 164, 165) to publish a notice, specifying any public improvement before determining upon it:

Held, that a notice of an intended public sewer in that city need not state its proposed depth beneath the surface of the street, and, it seems, if not sufficiently low to admit of his drainage, an owner cannot be assessed for its benefits. (*Id.*)

17. The common council of Rochester are directed by law (Laws, 1865, chap. 1639, § 7) to prevent the construction of any encroachment upon or obstructions in the bed of the Genesee river, within the limits of the city:

Held, that it is the intention of the act to enable the city to prohibit absolutely the erection of any such encroachments or obstructions, and regardless of the question whether such encroachments or obstructions retard the flow of water through the arches of any bridge established in the city on the stream below them. (*City of Rochester agt. Osborn*, 5 Lansing, 37.)

See ASSESSMENTS. (5 Lansing.)
RAILROAD MUNICIPAL BONDS.

MURDER.

See CRIMINAL LAW. (5 Lansing.)

MUTUAL ACCOUNTS.

See STATUTE OF LIMITATIONS. (5 Lansing.)

N.

NEGLIGENCE.

1. In an action for damages for negligently allowing a croton water pipe, by

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bursting, or otherwise, to wet and do damage to goods and building situated in the third story of a store occupied by the defendant, the plaintiff at the same time occupying the first floor and basement. (*Rudolphy* agt. *Fuchs*, ante, 155)

2. And it appearing from the evidence, which was submitted to the jury, and upon which they found a verdict for the plaintiff, that in respect to the question of negligence that the plaintiff was quite as much the producing cause of the accident in not having shut off the water in his basement when the store was locked up and left for the night, as the defendants were by having a pump in the third story—the packing of the piston rod of which was so worn as to admit the croton to pass up through it, a fact of which they may have been and probably were entirely ignorant, or in other words, that the plaintiff's negligence in this aspect of the case is as great in degree as that of the defendants. (*Id.*)

3. It seems, from the evidence, to be a case presenting the question of co-operative, mutual, or contributive negligence, which question the courts are usually exceedingly indisposed to take away from the jury, but when it is clearly defined and as palpable as it is in this case, it is a pure question of law, and no verdict of a jury can make it otherwise. (*Id.*)

See CORPORATION. (61 Barb.)
MUNICIPAL CORPORATIONS. (*Id.*)
SHIPS AND SHIPPING. (*Id.*)

4. All questions of negligence properly belong to the jury, and it is the duty of the court to submit all such questions to them. And it is the province of the jury to say what acts or omissions of the defendant constitute negligence. (*Matteson* agt. *The New York Central Railroad Co.*, 62 Barb. 364.)

5. In an action to recover damages for personal injuries caused by negligence, it is a question for the jury whether there was mental anguish resulting from the injuries, or not; and if there was, the plaintiff is entitled to be compensated for it. (*Id.*)

6. The right of recovery is not limited to past bodily pain and suffering, but the party is entitled to compensation for such future suffering as the evidence renders it reasonably certain must necessarily result from the injury. (*Id.*)

7. Negligence consists in omitting to do what a person ought to do. It is of

the essence of negligence that the party charged should have knowledge that there was a duty for him to perform; or he must have omitted to inform himself as to what his duty was, in a given case. (*Sherman* agt. *Western Transportation Co.*, 62 Barb. 150.)

8. In a great number of cases, knowledge is presumed, and the party will not be permitted to prove that he had not knowledge of his duty. (*Id.*)

9. When the law imposes a duty on a man, it presumes that he knew of it; and it will not permit him to prove that he did not. (*Id.*)

10. When the specific duty is not imposed by either the statute or the common law, the party alleging negligence must show that the accused was cognizant of the duty he is charged with having neglected. (*Id.*)

11. It is not necessary that this should be established by direct evidence; it may be, and almost universally is, inferred from the nature of the duty, or the facts and circumstances of the case. (*Id.*)

12. Negligence is never presumed. (*Id.*)

See CANALS. (62 Barb.)
RAILROAD COMPANIES. (*Id.*)

13. Where the plaintiff while walking upon the sidewalk was alarmed by the rapid driving of the defendant's express wagon upon the sidewalk behind her, so near as to give her reason for a belief that she was in danger, and in springing on one side struck and injured herself against a side wall:

Held, that the jury might award her damages against the defendant, and even although she would receive no injury from remaining in her position on the walk. (*Coulter* agt. *Am. M. U. Express Co.*, 5 Lansing, 67.)

See CANAL CONTRACTOR. (5 Lansing.)
EVIDENCE. (*Id.*)
MASTER AND SERVANT. (*Id.*)
MUNICIPAL CORPORATION. (*Id.*)
RAILROAD CORPORATION. (*Id.*)
SALE OF CHATTELS. (*Id.*)

NEW TRIAL.

1. On a motion for a new trial on the ground of newly discovered evidence in this case, it did not appear that the evidence alleged to have been newly discovered went to impeach the credit of any witness or party, examined as a witness on the trial; that it did not relate to any new fact upon which evi-

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dence was not given on the trial, and what evidence there was stated and claimed to be material was merely cumulative. Motion denied. (*Knoop* agt. *Kammerer*, ante, 449.)

2. No appeal lies to this court from an order denying a motion for a new trial on the ground of surprise or newly discovered evidence. The question is one of discretion with the court below. (*Donley* agt. *Graham*, 48 N. Y., 658.)

See APPEAL. (48 N. Y.)
PRACTICE. (62 Barb.)

NEW YORK (CITY OF).

1. An action will lie against the corporation of the city of New York to recover the damages sustained by an individual by the bursting or overflowing of a sewer, built under the direction of such corporation, and made of insufficient size and capacity to carry off the water; where the injury done was the direct consequence of the imperfect and insufficient construction of the sewer, of which the corporation had repeated notice. (*Leventhal* agt. *The Mayor, &c.*, of *New York*, 61 Barb., 511.)
2. There was no obligation to build a sewer, but a city corporation having determined to do so, a duty is imposed upon it to build one sufficiently large and so constructed as to carry off the water, and not to throw it, by means of the sewer, on the adjoining property. (*Id.*)
3. Under section 5, of the act of the legislature of April 19, 1871, (*Sess. Laws*, ch. 583,) which provides that no judgment, save on issues of law, shall be entered up, thereafter, against the city or county of New York, except upon the verdict of a jury, a judgment cannot be entered upon the report of a referee made subsequent to the passage of such act. (*Id.*)

NON-RESIDENTS.

See ASSESSMENT AND TAXATION. (48 N. Y.)

NOTICE.

1. In an action of trover for the conversion of a written obligation, the defendant is supposed to have it in his possession or under his control, and no notice to produce it on the trial is necessary to enable him to give parol evidence as to its contents; the action itself is notice. (*Hotchkiss* agt. *Mosher*, 48 N. Y., 478.)

See CONSTRUCTIVE NOTICE.

CONTRACTS. (48 N. Y.)

MUNICIPAL CORPORATIONS. (61 Barb.)

NOTICE OF SUIT PENDING.

1. The commencement of an action by the service of a summons does not create a *lis pendens* affecting third persons not parties to the action. To bind a purchaser *pendente lite* by the judgment, there must also be a bill or complaint on file at the time of his purchase, in which the claim upon the property is set forth. (*Leitch* agt. *Wells*, 48 N. Y., 585.)
2. The rule of *lis pendens* is a hard one, not a favorite of the courts, and a party claiming the benefit of it must clearly bring his case within it. In the absence of proof, therefore, it will not be presumed that the complaint was filed prior to the entry of judgment. (*Id.*)
3. Stocks are articles of commerce, passing from hand to hand like commercial paper, and the doctrine of constructive notice by *lis pendens* is not applicable to them. (*Id.*)

See *Jeffres* agt. *Cochrane* (*Mem.*). (48 N. Y., 671.)

O

OBLIGATION.

1. An obligation which, though called a bond, is payable to a person named therein, "or to his certain attorney, executors, administrators or assigns," belongs to that class of obligations which has been expressly held, in this State, not to be specialties, but in the nature of commercial paper, negotiable by delivery, under an assignment in blank. (*Blake* agt. *The Board of Supervisors of Livingston County*, 61 Barb., 149.)
2. An action upon such an obligation is to be governed in all respects, by the rules applicable to commercial paper. (*Id.*)

OFFENSIVE WORDS IN DEBATE,

1. Where a corporation in their by-laws adopt the rules in Cushing's Manual for the government of all debates of its members, and no other provision is made on that subject in the by-laws,

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Cushing's Manual must control the members of the corporation in that matter. (*The People* agt. *The American Institute*, ante, 468.)

2. That provides that if offensive words are not taken notice of *at the time they are spoken*, but the member is allowed to finish his speech, and then any other person speaks, or any other matter of business intervenes, before notice is taken of the words which gave offense, the words are not to be written down, nor the member using them censured. (*Id.*)
3. Therefore, where a member in debate, at a meeting of the corporation, uses what are considered offensive and improper words, which are not objected to or noticed at the time or during the meeting, he cannot be tried and expelled for using those words upon charges made at a subsequent meeting. Such expulsion is irregular and without authority. (*Id.*)

OFFICE AND OFFICER.

1. Where one furnishing men to fill the quotas of certain towns, under a call of the president, at the requirement of the provost marshal, deposited with him county bonds, under a parole agreement, that they should be held as security, at the rate of \$550 per man, that the men then and thereafter to be furnished by him should not desert before reaching the place of rendezvous: *Held*, that the agreement was void, under the statute of frauds, it being an agreement to answer for the default or miscarriage of another, and was not so far executed by the delivery of the securities as to give the officer an interest in or right to retain them. (*Richardson* agt. *Crandall*, 48 N. Y., 348.)
2. Under the act of Congress of 1863 (12 U. S. Stat. at Large, 731), "for enrolling and calling out the national forces," &c., it was the duty of the provost marshal, when men were presented for enlistment, if he found them of suitable age and "not physically or morally unfit for service," to enlist and muster them in. He had no right to reject them because he thought they would desert, nor to require security against desertion; therefore, aside from the provisions of the statute of frauds, the pledge of such bonds was illegally exacted, and was void, as taken *colore officii*. (*Id.*)
3. If he had a discretion in receiving or rejecting the men presented, it was his duty to have exercised this discretion, under his oath of office, uninfluenced

by the security which he exacted. In this view of the case, also, the pledge must be considered as against public policy, and taken *colore officii*. (*Id.*)

4. The statute of this state, as to securities taken *colore officii*, does not apply to officers of the United States, but the illegality of such a pledge is determined by the principles of public policy, as sanctioned by the common law. (*Id.*)
5. In order to condemn a security, as taken by a public officer *colore officii*, it is not necessary to show it was taken with an evil or corrupt intent. The officer may not legally exact a bond before he will perform a plain duty or when it tends to a lax performance of duty, although there be no actual corrupt motive. The law looks not to any particular contract to see that it is free from taint of actual fraud, oppression or corruption, but it looks to the general tendency of such contract, and it is condemned if it belongs to a class which the law will not tolerate. (*Id.*)
6. The common-law prohibition is aimed at the public officer, not at the one yielding to his exactions; the parties are not upon an equal footing; and when the former receives securities or money, contrary to those prohibitions, the parties are not *in pari delicto*. (*Id.*)
7. The agreement in this case was also void, as without consideration. (*Id.*)

See JUSTICE OF THE PEACE. (62 Barb.)

OVERSEERS OF THE POOR.

See BOND. (62 Barb.)

OYER AND TERMINER.

See CRIMINAL LAW. (61 Barb.)
PRACTICE. (*Id.*)

P.

PARENT AND CHILD.

1. When children are in the custody of their father, and are brought by him into court, in obedience to a writ of *habeas corpus*, sued out by the mother, he thereby surrenders them to the custody of the court as *parens patriæ*, pending the litigation. (*Matter of Viele*, ante, 14.)
2. And when the father and mother thereafter stipulate and consent that

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the writ be dismissed, it is proper that the order of the court entered upon that consent should not only direct that the writ be dismissed, but should dispense with the longer attendance of the children in court, by remanding them to the custody of the father, with whom the court found them, and also is *prima facie* entitled to them, although a neglect to add such an express provision to the order of dismissal of the writ is not *necessary* for the purpose of rehabilitating the respondent with parental authority, when the relator abandons the attempt to change the custody of the children to herself. (*Id.*)

3. If the mother afterwards improperly obtains possession of one of the children, and flees with it to a foreign country, she thereby renounces her right of applying to the court for any relief in the premises. (*Id.*)
4. Children being under a legal obligation to support their indigent parent, that liability is a sufficiently good consideration for upholding a promise by the sons of a poor person, to the overseers of the poor, to defray the necessary expenses of supporting her. (*Turner* agt. *Hadden*, 62 *Barb.* 480.)
5. The mother of a minor child, whose father is dead, may maintain an action for the services of the child, in cases in which the father might have done so if living. (*Simpson* agt. *Buck*, 5 *Lansing*, 337.)
6. The fact that the minor contributed to the support of the mother and is not dependent on her does not affect the right to recover. (*Id.*)
7. In an action for damages for seducing a minor daughter and servant, brought by the mother, a widow, it seems the plaintiff may recover, although the seduction was accomplished by force and against the will of the seduced. (*Damon* agt. *Moore*, 5 *Lansing*, 454.)
8. Exemplary damages are recoverable in the action. (*Id.*)
9. *Hogan* agt. *Cregan* (6 *Rob.*, 131) on this point disapproved. (*Id.*)

PARTIES.

1. The object of allowing an examination to be had before issue joined, of an adverse party, under §391 of the Code is not to enable the plaintiff to ascertain whether he has a cause of action, but to enable him to obtain testimony in support of a cause of action, which he has good reason to believe he has, and especially of those facts of which

he has reasonable grounds for believing the defendant has a peculiar knowledge, which he keeps concealed within his own breast. (*Winston* agt. *English*, *ante*, 398).

2. Nor is it to enable a defendant to ascertain whether he has a defense, but to enable him to obtain testimony in support of a defense which he has good reason to believe he has. (*Id.*)
3. This case is an action for a libel, and the application for plaintiff's examination is made upon defendant's affidavit, which shows the service of a complaint upon him, but does not describe the nature of the libel. No copy complaint is attached, nor has any been submitted to the court. (*Id.*)
4. As the case stands, the defendant has not only neglected to bring himself within the rules and practice of the court relative to the examination of a party under §391 of the Code before issue joined, but has failed to satisfy the court of the good faith of his application. (*Id.*)
5. The examination of adverse parties and bills of discovery considered under the common law, the Revised Statutes, court of chancery, and the Code. (*Id.*)
6. The examination of a party, provided for in section 391 of the Code, is now regulated by Rule 21, and can only be had, before issue joined, either to enable the plaintiff to frame his complaint, or the defendant to frame his answer. (*Winston* agt. *English*, *ante*, 498.)
7. The affidavit upon which the application for an order of examination is based, must show the materiality of the discovery sought, for the purpose of framing the pleading; and if the materiality does not appear, the application should be denied. (*Id.*)
8. The defendant who applies for such an examination, in order to frame his answer to a complaint which has not yet been served, cannot show the materiality of the discovery, because he does not know what the allegations of the complaint are to be. (*Id.*)
9. Where there are different claimants, each claiming distinct parcels of the real property in question, but all denying plaintiff's rights upon the same ground, and claiming title from the same source, it is proper to join them as defendants in the same action or proceedings, to compel the determination of the conflicting claims. (*Fisher* agt. *Hepburn*, 48 *N. Y.*, 41.)
10. Where rents were due from one ten-

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ant in common at the time of the death of another, the administrator of the latter is a proper party to an action of partition, as he is entitled to receive the rents due his intestate at the time of his death. (*Scott* agt. *Guernsey*, 48 N. Y., 106.)

11. The personal representatives of a deceased vendor are necessary parties to an action to compel a specific performance of his contract of sale. Where, however, the heir alone is made defendant, and the defect appears upon the face of the complaint, if no demurrer is interposed the defect is to be deemed waived, and his right to object is at an end. (*Potter* agt. *Ellice*, 48 N. Y., 321.)
12. Trustees, in whom is the title to a trust fund, are the proper parties plaintiff in an action to maintain and defend the fund against wrongful attack or injury, tending to impair its safety or amount. Neither the *cestuis que trust* nor beneficiaries can maintain such action against a third person, except in case the trustees refuse to perform their duty, and then the trustees should be made parties defendant. (*W. R. R. Co.* agt. *Nolan*, 48 N. Y., 513.)
13. It is ministerial, not judicial, officers whom the court has power to restrain when proceeding illegally under a claim of right. The process of injunction, in a proper case of staying a judgment, goes against the parties, not the tribunal or its judges. (*Id.*)
14. Where in an action brought by two plaintiffs, they fail to establish a joint interest, but a separate cause of action in favor of one of the plaintiffs is established, the court has power, under section 274 of the Code, to give judgment in favor of the one and against the other, but it is not bound so to do, and a judgment against both is erroneous. (*Calkins* agt. *Smith*, 48 N. Y., 614.)
15. Plaintiff and one S. were partners. Upon dissolution they entered into a written agreement, by which S. assigned and transferred all his rights and interest in the assets of the firm to plaintiff, who was to collect all the accounts, &c., and pay the firm debts, and with the share of S. in the residue, and the avails of certain individual property also transferred, to pay certain paper made in the firm name by S. for his individual benefit; the balance, if any remained, to be paid to S. In an action brought by plaintiff to recover a debt due the firm:
Held, that S. was not a necessary party

plaintiff. (*Phillips* agt. *Clark*, 48 N. Y., 677.)

16 The former practice of naming several persons as lessors of the plaintiff, in an action of ejectment, or of uniting several parties as plaintiffs, who might claim by separate and distinct counts, under different titles or demises, has been abolished by the Code. (*Hubbell* agt. *Lerch*, 62 Barb., 295.)

17. The action for the recovery of real property now stands upon the same footing, precisely, in respect to parties, and the union of causes of action in a single complaint, with all other actions. (*Id.*)

PARTITION.

1. Where, during the existence of a life estate, certain of the devisees of the remainder, with full knowledge of the limited title of the tenant for life, and without the consent of the other remainder men, erected buildings upon the premises devised:

Held, that they were not entitled to any compensation therefor, and, upon partition, could not exact a reimbursement from, or claim a lien upon, the shares of their co-tenants. (*Scott* agt. *Guernsey*, 48 N. Y., 106.)

2. The remedy, by an action, for rents, by one tenant in common against another, is cumulative, and does not bar the equitable adjustment of them on a partition in equity. (*Id.*)

3. The rents on a partition are a lien upon the shares or interest of any co-tenant from whom they may be due. (*Id.*)

4. Where rents were due from one tenant in common at the time of the death of another, the administrator of the latter is a proper party to an action of partition, as he is entitled to receive the rents due his intestate at the time of his death. (*Id.*)

5. It is a matter of discretion with the court below to direct a sale instead of actual partition, and unless the error is clear its decision will not be overruled. (*Id.*)

PARTNERSHIPS.

1. As between partners there are no profits until all losses and expenses are paid, no matter what the respective interests of the partners may be. Profits and losses, how ascertained on dissolution of a firm, and co-partnership

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articles in reference thereto, how construed. (*Eastwood* agt *McNulty*, ante, 392).

2. In forming a copartnership the parties can stipulate as between themselves that one partner shall be free from liability for loss, or that his liability be limited, and where one is to have a share of the profits of a business in consideration of his share of capital invested and imperiled therein, whatever may be the intent of the parties, this, as to third persons, makes him a partner. (*Ontario Bank* agt. *Hennessey*, 48 N. Y., 545.)

3. Where one member of a partnership, in order to pay his individual debt, makes his promissory note, and indorses it in the firm name, without the knowledge or consent of his copartners, and the creditor with knowledge of the facts receives the note, and in order to bind the firm transfers it before maturity to a bona fide holder, the creditor is guilty of a fraud and is liable therefor. But the fraud is not upon the firm; it is only upon those who did not consent to the indorsement. The cause of action arising therefrom is no part the assets of the firm, although the note has been paid out of such assets, and title thereto does not pass by a general assignment of all the property and effects of the firm, nor is any interest therein conveyed by an assignment made by one of the parties injured of his right and interest in the partnership assets. (*Collins* agt. *Smith*, 48 N. Y., 614.)

4. Such a fraud does not work a joint injury for which the injured partners can unite in a common-law action. The damage sustained by each is in proportion to his interest in the partnership, and he must bring a separate suit to recover it. (*Id.*)

See *Baldwin* agt. *Bald* (Mem.), 48 N. Y., 673.)

Babcock agt. *Hernance* (Mem.). (48 N. Y., 683.)

5. A charge, by one partner against another, for his personal services in superintending and managing the affairs of the copartnership, cannot be sustained and allowed, without proof, on his part, of an express agreement that compensation should be allowed for such services. (*Lyon* agt. *Snyder*, 61 Barb., 172.)

6. Where, during the existence of a copartnership, new leases of the premises occupied by the firm as its place of business are obtained by one of the partners, to himself, without the con-

sent of his copartner, for a term to commence before the partnership ends, such leases will be declared to be held by the lessee as trustee for the firm. (*Mitchell* agt. *Read*, 61 Barb., 310.)

7. The true rule is, that a partner cannot do any act that interferes with the business, or affects the interests, of the firm, for his individual benefit, and if he does so, he is bound to account to the firm therefor; but when his acts are independent of the business and interests of the partnership, and relate to a period beyond its existence, such rule does not apply. *Per* INGRAHAM, J. (*Id.*)

See PRACTICE. (61 Barb.)

8. The fact that the whole capital provided for by articles of copartnership has been lost, is sufficient ground for a refusal by one of the partners to further continue the business, although the time limited by the articles for the continuation of the copartnership has not expired. (*Van Ness* agt. *Fisher*, 236.)

See INSURANCE. (5 Lansing.)

R. R. MUNICIPAL BONDS. (*Id.*)

PATENTS.

See *Wilders* agt. *Stearns*. (48 N. Y., 656.)

DAMAGES. (61 Barb.)

PAYMENT.

1. An entry was made upon the journal of a bank in the regular day's business, charging certain mortgages held by the bank to the president and principal stockholder, who was the mortgagor, against a credit to him of a larger amount appearing upon the books of the bank. The book-keeper who made the entry had no recollection of the transaction. The mortgages were subsequently transferred by the bank to a bona fide purchaser for their face, the president and the bank representing them to be wholly unsatisfied and valid liens. In an action by a subsequent incumbrancer to remove the liens of the mortgages:

Held, that the entry alone without some evidence of its adoption by the mortgagor and the bank, was not sufficient proof of the payment of the mortgages; and the subsequent action of both in negotiating the mortgages rebutted any inference of acquiescence or adoption. (*Whitehouse* agt. *Bank of Cooperstown*, 48 N. Y., 239.)

See INSURANCE. (LIFE.) (62 Barb.)

TOLLS. (*Id.*)

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PERSONAL PROPERTY.

See CHATTEL MORTGAGES. (48 N. Y.)
RECOVERY OF POSSESSION OF PERSONAL PROPERTY. (48 N. Y.)

PLANK-ROAD COMPANIES.

1. As under the provisions of the "Act to provide for the incorporation of companies to construct plank-roads," &c. (chap. 210, Laws of 1847), in order to enforce the personal liability given by said act (§ 44) against stockholders, provision is made that a joint action may be prosecuted against the company and any one or more stockholders liable to contribute to the payment of its debts, the moment a cause of action accrues against the company it accrues against each stockholder liable, and as to them the statute of limitations begins to run. If therefore an action against a stockholder is not commenced within the period prescribed by the statute of limitations, it is barred. (*Conklin agt. Furman*, 48 N. Y., 527.)

See TOLLS. (62 Barb.)

PLEADINGS.

1. An admission in an answer that a deed was executed to the defendant is, in effect, an admission that the deed was signed, sealed and delivered. (*Thorp agt. Keokuk*, 48 N. Y., 253.)

See PARTIES. (48 N. Y.)

2. In an action to recover damages for injury, on the ground of negligence of the defendant, no rule of pleading requires the plaintiff to allege his own freedom from negligence. (*Haskell agt. Village of Penn Yan*, 5 Lansing, 43.)
3. To confer jurisdiction on the county court, the complaint must, upon its face, show that the defendant is a resident of the county in which the action is commenced. (*Judge agt. Hall*, 5 Lansing, 69.)
4. A demurrer lies under section 144 of the Code to a complaint which omits to state this fact. (*Id.*)
5. In an action against M. and others, "trustees of school district No. 4," &c., the plaintiff alleged his performance of an agreement with "said trustees" to build a school-house, and their neglect to pay:

Held, that there could be no recovery against the trustees, as there was no averment that the defendants were trustees, nor that the plaintiff claimed

to recover against them as such. (*Shuler agt. Meyers*, 5 Lansing, 170.)

- 6 Nor is such a complaint sufficient without an averment that the trustees were authorized in proper form (Laws 1864, 1243. § 16. sub. 7; 1252, § 49, sub. 5) to make the contract. (*Id.*)
7. An application at the trial to amend a complaint against individuals, as such, to one seeking a recovery against them as officers in a corporate capacity, is properly refused. (*Id.*)
8. A defense that the sale counted on in the complaint is void, for having been made without a license, must be set up in the answer. (*Gilbert agt. Sage*, 5 Lansing, 287.)

See INDICTMENT. (4 Lansing.)
JUSTICE OF THE PEACE. (*Id.*)
PRACTICE. (*Id.*)
RESCISSION OF CONTRACT. (*Id.*)

PLEDGE.

1. Where a pledgee of bonds, after the payment of the loan for which they were pledged, promises to return the same, but on demand made, refuses to do so, an action will lie for their conversion; in which the plaintiff will be entitled to recover the value of the bonds, with interest. (*Roberts agt. Berdell*, 61 Barb., 37.)
2. The statute of limitations does not commence running, against such an action, until the time of the demand and refusal. (*Id.*)

POSSESSION.

1. Possession, to operate as constructive notice of title to subsequent purchasers, &c., of lands, must be open and visible by improvement of the premises, &c., in distinction from mere fencing, pasturing, cutting timber, &c. (*Trustees of Union College agt. Wheeler*, 5 Lansing, 160.)

See ADVERSE POSSESSION.

POSTHUMOUS CHILD.

See ACTION. (5 Lansing.)
ADVANCEMENT.
EVIDENCE. (*Id.*)

PRACTICE.

1. While a sale by one partner to the other, of all his interest in the partnership, stands, the copartnership books belong to no one but the purchaser;

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- and while they belong, exclusively, to him, no one else has the right to a general inspection of them. (*Platt* agt. *Platt*, 61 Barb., 52.)
2. Hence, in an action by the executors of a partner who has parted with his interest in the partnership and conveyed it to his copartner, against the latter, to set aside the releases and conveyances, the plaintiffs are not entitled, before judgment to a general inspection of the books of the firm. (*Id.*)
 3. It has become the uniform practice, in the first district, to refuse applications to compel the production of books and papers, on the examination of a party before trial; and that practice is the correct one. (*Hauseman* agt. *Sterling*, 61 Barb., 347.)
 4. The statute has pointed out the only mode by which a discovery of books and papers can be obtained, before trial. To do so, the party applying must not only show what he wants, but must also show proof that he cannot obtain the information elsewhere. (*Id.*)
 5. The act of 1835, (*Laws of 1835*, ch. 211,) which provides that when default is obtained against part of the defendants, the plaintiff may proceed to the trial or hearing against the other parties, in the same manner as if the suit had been commenced against the other parties only, and the action shall be thereby severed, has been suspended and abrogated by the Code. It is inconsistent with the provisions of the Code, and is therefore repealed by section 468. (*Genet* agt. *Lawyer*, 61 Barb., 211.)
 6. A motion to strike out the testimony of a witness because he testified from a copy of a memorandum, showing the weight of a quantity of wool, should, in order to be effectual, be made as soon as that is discovered to be the case. (*Pitney* agt. *The Glens Falls Ins. Co.*, 61 Barb., 335.)
 7. Where counsel, instead of making such a motion as soon as the fact appeared, continued the examination of the witness afterwards, on that and other subjects, at considerable length, without objecting; *Held*, that by so doing, the objection to the evidence as being secondary in its nature, was waived, because not made in time. (*Id.*)
 8. The object of the section of the Revised Statutes, (2 R. S. 481, §7,) requiring, in actions for the recovery of a penalty, or forfeiture, a reference to the statute by which the action is given to be indorsed upon the process issued, was to inform the defendant of the nature and cause of the action against him. (*Cox* agt. *New York Central and Hudson River R. R. Co.*, 61 Barb., 615.)
 9. The object and purpose of the statutory requirement are fully and completely answered and fulfilled, without the indorsement, when the complaint is annexed to the summons and served with it, and contains the very reference which should, strictly, be indorsed upon the summons. (*Id.*)
- See ABATEMENT AND CONTINUANCE (61 Barb.)
- ATTACHMENT (*Id.*)
 ESTOPPEL (*Id.*)
 EVIDENCE. (*Id.*)
 INFANTS. (*Id.*)
 JUDGMENT. (*Id.*)
10. It is not only the right, but the duty, of the court, to direct the verdict which the jury shall give, when the evidence in the case is so preponderating in favor of one of the parties that if a verdict should be found one way, the court would set it aside as against evidence. (*Fish* agt. *Davis*, 62 Barb., 122.)
 11. The converse of the rule—to wit, that when the evidence is not so preponderating in favor of one of the parties as that the court would set aside a verdict found against the evidence, the case must go to the jury—is equally as well settled. (*Id.*)
 12. A judge, at the circuit, has no power to grant a new trial, except where he has been authorized by the legislature to do so. (*Wilcox* agt. *Hoch*, 62 Barb., 509.)
 13. There are but two cases in which he may grant a new trial. One is, that at the same circuit at which a cause is tried he may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages. The other is when a motion is made for a new trial on a case or exceptions, or otherwise. (*Id.*)
 14. It is clearly within the power of the justice holding a circuit to direct a verdict subject to the opinion of the court at general term, and to instruct the jury to find upon a specific question of fact. (*Id.*)
 15. When a party is permitted to move to set aside a verdict and for a new trial, a general or special verdict as

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defined in section 260 of the Code is most obviously intended. (*Id.*)

16. There is no mode by which a party in whose favor a general verdict is rendered and against whom the jury have answered specific questions of fact submitted to them by the judge can proceed, except to vacate the verdict, if the other party will consent; if not then to move for a new trial upon the whole case; *it seems. Id.*

17. In such a case, the party cannot move, at the circuit or special term, for a new trial of the specific question of fact submitted to the jury. (*Id.*)

18. So long as there are disputed questions of fact in the case, it is erroneous for the judge, at the circuit, to direct a verdict for the plaintiff, subject to the opinion of the court at general term. (*Id.*)

19. When a special verdict is found, by the jury, in favor of the plaintiff, the plaintiff is bound to move for judgment thereon, at the special term. It is not in the power of the justice holding the circuit to send that motion to be heard, with the exceptions, in the first instance, at a general term. (*Griswold agt. Dexter, 62 Barb., 648.*)

20. A motion for a new trial cannot be made where a special verdict is found. It is not a remedy adapted to the case. (*Id.*)

21. In an action for the recovery of specific real property, it is the right of the jury, in their discretion, to find a special verdict, and of course to find the facts as they, upon the evidence, are satisfied is just and right. The court has no authority to require them to find a special verdict; still less to require them to find specific facts. (*Id.*)

See JURY. (62 Barb.)

22. A question of usurpation, intrusion, or unlawful holding or exercising a corporate office, must be treated as a legal, not as an equitable cause of action. (*People agt. Albany and Susquehanna R. R. Co., 5 Lansing, 25.*)

23. If legal and equitable causes of action are joined in one complaint, and without the defendant's objection, the plaintiff proceeds to trial, he is entitled to judgment on establishing either or any of the causes of action. (*Id.*)

24. Where legal and equitable causes of action are at issue in one cause, all the issues, unless referred, or a jury trial waived, must be tried by jury. (*Id.*)

25. But where such issues were noticed for trial at a special non-jury term, and the plaintiff's case was opened without objection by the defendant, or suggestion that a jury was desired; *Held*, the plaintiff's opening being made in good faith, and in such manner as to apprise the defendant that he had fairly entered on the trial, that an application afterwards for jury trial was properly regarded as too late, and the right thereto as waived. (*Id.*)

26. The attorney-general cannot maintain an action to restrain the prosecution of actions arising out of controversies between different claimants of the directorship or management of a railroad corporation, for cancellation of stock, to restrain town commissioners from voting on stock, those claiming to be directors from acting as such, &c., in which actions injunctions have been issued and receivers appointed and given rise to conflict of authority between public officers in the attempted execution of conflicting processes from different judicial officers, in such manner as to endanger the public peace. Such proceedings, and the disorder arising therefrom, do not constitute a public nuisance. (*Id.*)

27. The doctrine of *The People agt. Miner* (2 *Lansing*, 396), as to the authority of the attorney-general in the prosecution of actions, reaffirmed. (*Id.*)

28. A judgment which awards to some of the defendants costs, as against the remaining defendants in the same action, unless the award is necessary in the adjustment of their rights in the subject-matter of the action, is erroneous. (*Id.*)

29. Section 274 of the Code intends by "ultimate rights," those rights of the parties in the subject-matter of the action in distinction from the costs, and the affirmative relief authorized by the second clause of the section is relief as between plaintiff and defendant. (*Id.*)

30. The discretionary power to make an additional allowance under section 309 of the Code is given to the court, and cannot be delegated. The appointment of a referee to ascertain and report what would be a proper allowance, and to which of the defendants it should be paid, is erroneous. (*Id.*)

31. An additional allowance where the rights in controversy have no money value is also erroneous. (*Id.*)

32. A County Court allowed an amend-

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ment, after verdict, by which the damages claimed were increased to a sum equal to the finding, no condition being imposed that the plaintiff should relinquish the verdict, pay costs of trial, and consent to a new trial; *Held*, that there was no authority for the amendment, and that the order was reviewable on appeal. (*Coulter* agt. *Am. M. U. Express Co.*, 5 *Lansing*, 67.)

33. Where an insolvent judgment debtor has assigned property through a third person to his wife, without payment of any consideration, the intermediate assignee is, it seems, a necessary party to an action by the judgment creditor to set aside the assignments and have his judgment declared a lien on the property. (*Bennett* agt. *McGuire*, 5 *Lansing*, 183.)

34. No exception to a decision is necessary in a Justices' Court; it is enough that objection is made and overruled. (*Roe* agt. *Hanson*, 5 *Lansing*, 304.)

35. Objection to a referee's finding, in an action for obstructing a highway, "that the application and proceedings (for laying out the highway) were in manner and form, as prescribed by the statute, and that the commissioners properly laid out the highway," on the ground that the notices of a freeholders' meeting were not sufficiently posted, without a request for a specific finding, will not raise a question on appeal as to the sufficiency of the notice. (*Cooper* agt. *Bean*, 5 *Lansing*, 318.)

36. Facts assumed upon the trial as existing, will be regarded on appeal as admitted. (*Id.*)

37. A nonsuit may be sustained, although placed upon an untenable ground, if it appears from the facts that there was good ground for granting it. (*Beckwith* agt. *Whalen*, 5 *Lansing*, 276.)

38. Where a referee's findings do not expressly negative an allegation of fraud in the complaint, and an inference that he has found upon it affirmatively would contradict and destroy the whole theory upon which he has determined the case, such an inference cannot be made. (*Stowell* agt. *Haslett*, 5 *Lansing*, 380.)

39. Where the summons is served by copy, and the defendant appeals from the judgment upon errors of fact, to be established by affidavits and other proofs (Code, § 366), and relies on want of authority to appear before him below, he must show the fact by affida-

vits or testimony. (*Sperry* agt. *Reynolds*, 5 *Lansing*, 407.)

40. The defendant proved a supplemental agreement, not mentioned in the pleadings, which upon proof of other facts would have reduced the recovery, no pretence of having been misled or injured being made; *Held*, that a nonsuit on the ground of variance was error. (*Marsh* agt. *Dodge*, 5 *Lansing*, 541.)

See ACTION. (5 *Lansing*.)

AMENDMENT. (*Id.*)

APPRAISAL OF PROPERTY TAKEN FOR RAILROAD PURPOSES. (*Id.*)

CRIMINAL LAW. (*Id.*)

EVIDENCE. (*Id.*)

INDICTMENT. (*Id.*)

INJUNCTION. (*Id.*)

JUDGMENT DEBTOR, &c. (*Id.*)

JUSTICES' COURT. (*Id.*)

PLEADING. (*Id.*)

SURROGATE. (*Id.*)

VERDICT. (*Id.*)

PRACTICE ON APPEAL.

See APPEAL. (5 *Lansing*.)

EVIDENCE. (*Id.*)

PRACTICE. (*Id.*)

PRESUMPTION.

1. Where an insolvent judgment debtor is shown to have assigned property through a third person to his wife without payment of any consideration, the whole transaction being concluded at one time, it seems, fraudulent intent on the part of the debtor may properly be inferred, and a judgment based upon such an inference will be sustained. (*Bennett* agt. *McGuire*, 5 *Lansing*, 183.)

2. And so it seems there may be an inference of knowledge of such intent in the intermediate assignee and in the wife from the same circumstances. (*Id.*)

See ACTION. (5 *Lansing*.)

EJECTMENT. (*Id.*)

EVIDENCE. (*Id.*)

MUNICIPAL CORPORATION. (*Id.*)

PRACTICE. (*Id.*)

PREScription. (*Id.*)

PRINCIPAL AND AGENT.

1. Where a general agent of a life insurance company, under an agreement with a physician, issued a policy of insurance to the latter, whereby the physician agreed to pay a certain sum

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and such memorandum or record of the deputy is competent evidence to prove the demand and protest and notice thereof, under the act of 1865, chap. 309. (*Fassin* agt. *Hubbard*, 61 *Barb.*, 548.)

2. It having been decided that the corporation known as "The Onondaga Fine Salt Manufacturing Company" was organized for an illegal purpose; and that all contracts entered into with it for giving effect to the illegal purposes of the corporation are illegal and void, that question is not open for discussion. (*Burton* agt. *Stewart*, 62 *Barb.*, 194.)
3. Accordingly held that a promissory note, made by the defendant, and given to the corporation upon a settlement between it and him, of dealings growing out of the illegal operations of such corporation, was, as between the original parties to that note, illegal and void. (*Id.*)
4. The plaintiff was the president of such corporation. He became the payee and indorser of the note without any request, and without the knowledge of the defendant. As agent of the corporation he settled with the defendant, and had knowledge of the consideration of the note. Held that as between the plaintiff and the defendant, the note was without any consideration to support it. (*Id.*)
5. But that when such note was transferred to a bank, and by it discounted, before maturity, and without notice, for value paid, it became, in the hands of the bank, valid and operative against all the parties to it. (*Id.*)
6. It is optional with an accommodation indorser, or surety, to sue his principal either upon the note, or for the money paid upon it. If he sues upon the note, he can recover no more than the face of the note, with interest: whereas, by suing for the money, he becomes entitled not only to the amount of the note and interest, but also to the costs paid by him in the suit upon it. (*Id.*)

PUBLIC OFFICERS.

See INDEMNITY. (62 *Barb.*)
JUSTICE OF THE PEACE. (*Id.*)

1. If an agent of a town has on hand (e. g., a county treasurer) money which has been appropriated by proper authority to pay a sum not legally chargeable on the town, an action will lie or a *mandamus* will issue against such agent. (*Per MULLIN*, P. J.) (*Healey* agt. *Dudley*, 5 *Lansing*, 115.)

2. Otherwise, where the agent has not received the money, and it is sought to compel him to apply to some other officer to pay it over to him, or where the act of appropriation has been annulled or rescinded. (*Id.*)

3. The sureties upon the bond of a school district collector are not liable for his refusal to pay over, upon order of the district trustee, moneys received during a term of office which has expired at the time the order is made, and with respect to which term the bond was given, the collector being his own successor in office. (*Overacre* agt. *Garrett*, 5 *Lansing*, 156.)

See INSPECTORS OF ELECTION. (5 *Lansing*.)

JURISDICTION. (*Id.*)

SHERIFF. (*Id.*)

PROPRIETARY RIGHTS.

1. Where the plaintiffs voluntarily publish pictures to the public, for which they claim the proprietary right, the published copies furnish the defendants the means of reproducing the pictures without any invasion of the plaintiffs' proprietary rights therein. (*Oertel* agt. *Jacoby*, ante, 179.)

PUBLIC POLICY.

See AUCTION SALE. (5 *Lansing*.)

Q.

QUESTION OF FACT.

See CANAL CONTRACTOR. (5 *Lansing*.)
CRIMINAL LAW. (*Id.*)

QUIET ENJOYMENT.

See COVENANT OF WARRANTY. (5 *Lansing*.)

R.

RAILROADS.

1. The plaintiff on one side and a majority of the executive committee of the defendant's railroad on the other side, agreed, among other things that the plaintiff, except for a good and sufficient cause shown for his removal, should have the permanent and supreme control in the management of the company's road and interests, at a salary of \$6,000 per year, and an increase thereof in proportion to a certain increase of the company's profits. That

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thereupon, March 2d. 1869, plaintiff was elected a director of the company: (*Queen* agt. *Second Avenue R. R. Co.*, ante, 281.)

2. That at the annual meeting of stockholders held April 5th, 1869, he was elected a director for a full term, and that at a meeting of the board of directors held the next day he was elected vice-president of the company, and thereupon the following resolution was passed by the board: (*Id.*)
 3. "Resolved that the vice-president perform the duties of general superintendent of the road, (one of the elective officers of the company) with the right to employ the former superintendent or such other person as he may see fit in his place to assist him until the further action of the board, and the salary of the vice-president be \$6,000 per annum." (*Id.*)
 4. It appeared that on the day of the passage of that resolution, to wit, April 6th, 1869, plaintiff assumed the management of the road, and that he continued in such management and in the receipt of a salary at the rate of \$6,000 per annum, until July 6th, 1870, when he was removed from such management, and also from the vice-presidency, by a vote of the board of directors without any cause being assigned for such removal.
- Held*, that the arrangement between the executive committee and the plaintiff was a contract not binding upon the defendant. The executive committee had no power from the charter, or by-laws to make such a contract personally or as an executive committee. Besides so far as the passage of said resolution of April 6th, 1869, and plaintiff's acquiescence therein constituted a new contract, it was one that was inconsistent with the prior arrangement entered into between plaintiff and the executive committee. Being inconsistent, such new contract became, at least to the extent of its inconsistency, a substitute for the prior arrangement. (*Id.*)
5. Therefore, under the resolution of April 6th, 1869, the plaintiff was an officer of the company, and that his term of office was subject to the fifth section of the by-laws and consequently terminable at the pleasure of the board, and his claim under the arrangement made with the executive committee for a portion of his salary claimed upon the second year was not sustainable. (*Id.*)
 6. Where a passenger on a horse-railroad

car, enters the car near one end of the route and pays full through fare, he is entitled to go through without any further payment of fare. (*Hamilton* agt. *Third Avenue R. R. Co.*, ante, 294.)

7. If on stopping the car at the depot, with the announcement that it does not go any further, and the passenger is directed, with the others, to take another car, which is waiting for them, but no transfer ticket is given him, but he is informed by the driver of the waiting car that the passengers from the car that has stopped will not have to pay any further fare, and, subsequently, the conductor calls on this passenger for his fare, who refuses to pay again, as he had paid once, and the conductor, per force, removes him from the car for such non-payment, although the conductor may be strictly within the rules of his duty to the company, the railroad company are liable for damages to the passenger not only for compensatory, but for exemplary damages. In this case, \$500. (*Id.*)
8. Corporations, as well as natural persons, are liable for exemplary damages. (*Id.*)
9. The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice, printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried. (*Ransom* agt. *Pa. R. R. Co.*, 48 N. Y., 212.)
10. If, however, the passenger's attention is called to it when purchasing his ticket, or if he knew of it when he purchased, the law will presume, in the absence of any objection upon his part, that he assented to the terms. The contract is made, and rights and duties of the parties are determined, when the ticket is purchased. A discovery by the passenger of the notice after he has entered upon his journey does not affect his rights. (*Id.*)
11. The railroad act (chapter 140, Laws of 1850), fixes no tariff or rate of freight. This is a subject of contract solely. The agreement to carry is a consideration for the agreement to pay the freight. The liability to pay freight is the consideration for the agreement to carry. The parties may fix such reasonable rates as they may agree upon, and they may make such limitations to the liability of the carrier as they think proper. (*Nelson* agt. *H. R. R. Co.*, 48 N. Y., 498.)
12. Plaintiff purchased of K., W. & Co.,

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a mirror, directing them to deliver it to the defendant for transportation to Fulton, N. Y. K., W. & Co. sent it by a cartman to defendant's depot. The agent in charge refused to receive it unless the cartman would sign a contract releasing the company from liability for breakage, &c., unless caused by collision resulting from negligence of its servants, in consideration of its agreement to carry at tariff rates. The contract contained a clause that if objection was made to it the freight agent was to be notified before the property was shipped. K., W. & Co. knew of the custom of the company to require such a contract before receiving goods liable to extra hazards. The cartman signed as agent for shipper and owner. It was agreed that the mirror should be retained until the next day, and should be returned if K., W. & Co. requested. The cartman delivered a duplicate of the contract, and stated the facts to K., W. & Co. No dissent or request to return having been made by the latter, the mirror was forwarded and broken *in transitu*:

Held, that K., W. & Co. were authorized to make the contract on behalf of plaintiff; that they could depute the cartman to make it for them; that there was a complete ratification of his acts, and that the contract made by him was valid and binding upon the plaintiff. (*Id.*)

13. The crossing of highways, by a railway, at grade, is not unlawful. It is therefore neither a nuisance nor a trespass, at law; nor does such crossing require the highway commissioners' consent thereto. (*Baxter* *agt. The Spuyten Duyvil and Port Morris R. R. Co.*, 61 Barb., 428.)

14. A court of equity has no power to restrain the construction of a railway authorized to construct it. (*Id.*)

15. After a railroad company has applied for, and obtained, an order of the Supreme Court, on notice to the commissioners of highways, as required by chapter 582, of the Laws of 1864, authorizing it to construct its road "upon or along any highway," the commissioners of highways cannot prevent, nor the court restrain, the construction of its railroad upon, along or across any public highways. (*Id.*)

16. Where a person purchases from a railroad company, a passage ticket, bearing upon its face, the words "Good for this day, only," with the date indorsed, such ticket will not entitle the

holder to a ride in the company's cars, on a day subsequent to its date. (*Boice* *agt. The Hudson R. R. Co.*, 61 Barb., 611.)

17. Such a ticket is to be regarded as the evidence of the contract made by the company to carry the holder. (*Id.*)

18. And verbal declarations of the company's ticket agent, made subsequent to the purchase of such ticket, as to its being good at any time thereafter, will not constitute a valid contract; in the absence of any proof that the agent had authority to make an oral contract for the company, varying the one indicated by the ticket. Such an authority, in the agent, will not be presumed. (*Id.*)

19. Section 2055 of the Code of Georgia, which provides that "when there are several connecting railroads, under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus, and until delivery to the connecting road, the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability," was evidently intended to limit the liability of a railroad company to its own terminus, where the contract is a general one, merely, depending on delivery of the goods to be transported with directions to carry beyond such terminus. (*King* *agt. The Macon and Western Railroad Company*, 62 Barb., 160.)

20. Such an express contract is made, by a railroad company, when it receives cotton for transportation, and is reduced to writing by its agent, in a receipt given therefor, by which the company agrees to transport the same to New York, limiting its liability for loss by fire to a burning on the cars. (*Id.*)

21. There is no holding, in this State, that a railroad company is bound to furnish a safe road-bed, or in default thereof is liable for an injury to one of its employees, occasioned by such default. *Per BALCOM. J.* (*Tinney* *agt. The Boston and Albany Railroad Co.*, 62 Barb., 218.)

22. Repairs of a railroad track were attempted to be made without interfering with the passage of the trains. The times of the passage of such trains were well understood, and to in-

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- sure safety it was only necessary that the employees of the company should have an accurate time-piece, to enable them so to conduct the work that the track should be in order, on the arrival of the next train. *Held* that it was the duty of the company to see that the men employed in labor of that kind were furnished with a proper time-piece. (*Matteson* agt. *The New York Central R. R. Co.*, 62 Barb., 364.)
23. And it appearing from the evidence, that the officers of the company paid no attention to that subject, but left the foreman to procure, and attend to the regulation of, their own watches; it was *held*, that on this evidence the jury had the right to pass, and say whether it was or was not negligence in the company thus to conduct itself. (*Id.*)
24. A locomotive upon the defendant's railroad was thrown off the track, by reason of a switch being misplaced, and the engineer killed. In an action brought by his administratrix, against the company, to recover damages on the ground that the death of the engineer was caused by the negligence of the switch-tender, whom the defendant retained in its employ after it knew that he was careless and incompetent; *Held* that after evidence had been given, sufficient to justify the inference that the switch was wrongly placed by the switchman, it was error to reject the defendant's offer to show that it was probable the switch had been changed by some one else, in the absence of the switchman. (*Baulec* agt. *The New York and Harlem Railroad Co.*, 62 Barb., 623.)
25. The general railroad laws of this State are to be construed harmoniously, as respects their various provisions, and strictly, as to the rights of the parties. (*Matter of the New York and Boston Railroad Company*, 62 Barb., 85.)
26. By conforming to the provisions of those laws, corporations may acquire a title in fee to lands necessary for their purposes, against the will of their owners. But corporations must conform to such provisions, before they can acquire any title or rights thereto. (*Id.*)
27. If the occupant does not take the statutory steps, within fifteen days, to secure a review, or alteration of the route, the route may be considered settled, and his right thereafter to object to its location, as lost. (*Id.*)
28. Such notice to the occupant must be served before applying for the appointment of commissioners of appraisal. Presenting a petition for appointment of commissioners, is not a sufficient compliance with the requirement as to notice. (*Id.*)
29. The preliminary survey under section 28 is to be made before the application for commissioners of appraisal under section 14. And the notice to occupants, under section 52, must be given before the right to proceed under section 14 begins. (*Id.*)
30. Requisites of the map and profile of the route of a proposed railroad which are required to be filed in the county clerk's or register's office, before constructing any part of such road. And the particulars in which the map and profile in this case were held defective. (*Id.*)
31. If a railroad company fails to comply with the necessary pre-requisites for obtaining the appointment of commissioners of appraisal, it does not secure the right to have the property condemned, against the opposition of its owners.
- See Towns.* (62 Barb.)
32. A charge to the jury in an action against a railroad company for negligently causing the death of the plaintiff's intestate at a railroad crossing in a city, to the effect that even if it appeared that the signals were not given for the entire distance required by law, it would not necessarily follow that the company would be liable if the bell was rung or whistle sounded for such a distance from the place of the accident as fully and fairly to give the deceased timely and sufficient warning that the train was approaching, in time to prevent him from crossing or attempting to cross the track, sustained as correct. (*Cook* agt. *New York Central Railroad*, 401.)

RAILROAD MUNICIPAL BONDS.

1. In proceedings to bond municipal corporations in aid of railroads (L. 1869, p. 2,303) a petition must be presented to the county judge, signed by the requisite number of tax-payers (§ 1) before he is authorized to make an order for notice of a hearing. (*People ex rel. Delafield* agt. *Hughitt*, 5 Lansing, 89.)
2. The act (§ 2) requires personal appearance and consent before the county judge, at the time and place designated for taking proof, by tax-payers who

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have not signed the petition, as indispensable to their being counted as consenting. (*Id.*)

3. Expression of a desire by some of the petitioners in their petition that the proceeds of the proposed bonds shall be invested in first mortgage bonds of the railroad, does not render the petition insufficient or informal. (*Id.*)
4. An averment in the petition that the subscribers constitute a majority of the tax-payers, and represent a majority of the taxable property on the last assessment roll of the town, is indispensable, and without it the petition is fatally defective. (*Id.*)
5. In ascertaining whether a majority of the persons whose names are upon the tax-roll have consented to bonding a town for railroad purposes, on application under the statute (Laws 1869, chap. 907, p. 2,303, etc.), joint owners of property are to be counted separately (*People ex rel. Sayre agt. Franklin*, 5 *Lansing*, 129.)
6. One whose name appears on the roll and who has signed the petition, must be counted as a petitioner, although, after assessment of the tax and before signing the petition, he has parted with his interest, or, it seems, removed from the town. (*Id.*)
7. It seems the consent of the tax-payer is in the nature of the vote of an elector. (*Id.*)
8. Signatures to the petition, of tax-payers appearing on the proper roll, induced by payments in the nature of a bribe, are nevertheless valid. (*Id.*)
9. It is otherwise where the tax-payer has been induced to sign by misrepresentation as to the nature of the instrument signed, or as to the company to be benefitted by the bond, and has had no opportunity to inform himself of the contents of the petition. (*Id.*)
10. But the signers must exercise due care and caution in this respect, as where the petitioner signed under the inducement of false representations, but had in his possession the means of information as to the truth, the consent was held valid. (*Id.*)
11. The petition must designate the railroad company in view, and it must be an existing incorporated company, and it seems a petition signed before incorporation of the company is void. (*Id.*)
12. Petitioners cannot withdraw their consent before presentation of the petition. (*Id.*)

REAL PROPERTY.

Sec DETERMINATION OF CLAIMS TO REAL PROPERTY. (48 *N. Y.*)
FIXTURES. (*Id.*)

RECEIPTS.

1. Where, upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with knowledge, and there was no error or fraud. (*Ryan agt. Ward*, 48 *N. Y.*, 204.)

REPLEVIN.

1. A demand for the delivery of personal property which has come lawfully into possession of the party from whom it is claimed, must be made after it is due, before replevin will lie. And a covenant in a lease of real and personal property, which agrees that the latter shall be delivered at the termination of the lease, does not dispense with the necessity for demand after such termination as a foundation for replevin. (*White agt. Brown*, 5 *Lansing*, 78.)

RESCISSION OF CONTRACT.

1. In an action brought for the rescission of a contract to exchange the plaintiff's lands for lands of the defendant, and of the conveyances in execution thereof, on the ground of fraudulent misrepresentations made by defendant to plaintiff; the complaint claiming such other relief as might be just; *Held*, that plaintiff was entitled to the rescission prayed for, if the representations by which plaintiff was induced to make the exchange were such as materially to affect the value of the lands received by him, and were untrue and plaintiff believed them, whether they appeared to have been fraudulently made or not. A mutual mistake of the parties in the absence of fraud would be sufficient ground for the relief, it appearing also that the parties could be restored to the positions originally occupied by them. (*Hammond agt. Pennock*, 5 *Lansing*, 358.)

REFEREES.

1. A referee has no power on the trial to allow a defendant to withdraw a second defense in the answer, consisting of a counter-claim, upon which he commences a cross-action against the

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plaintiffs, and then allow him to interpose a second defense to the answer in the original action, as an amendment thereof, by inserting substantially, but in a different form, the same counterclaim again, claiming \$130,000 damages; and all this without notice to the plaintiffs or their attorney, except on the motion to amend the answer. (*Livermore* agt. *Bainbridge*, ante, 357.)

2. To cap the climax, the referee in this case, before making his report, called upon one of the plaintiffs personally, and suggested to him whether it would not be better for the plaintiffs to settle the matter with the defendant by paying him \$35,000, which defendant would probably accept, as there were matters in evidence in the case which led him to believe that if he did give judgment for the defendant, it would necessarily be for a very large amount. The plaintiffs, having in their complaint, claimed from the defendant on contract some \$17,000, did not feel disposed to accept the friendly advice of the referee, whereupon, a few days subsequently, the referee reported against the plaintiffs, and as due the defendant, the sum of \$120,000. (*Id.*)
3. Judgment vacated, and report of referee set aside for irregularity and order of reference discharged. (*Id.*)
4. A Referee cannot disregard undisputed evidence, nor judicially infer something else to be true, of which there is no evidence. (*Fordham* agt. *Smith*, ante, 472.)
5. A refusal to find facts of which there is evidence undisputed, and an exception to such refusal, raises a question of law to be heard by the court of appeals. (*Id.*)
6. Where the allowance or disallowance of a proposed amendment to a pleading, is in the discretion of the referee, the exercise of that discretion, even if reviewable on appeal, will not be interfered with by the court on motion. But where the referee either has no power, or refuses to interfere because of a supposed want of power, the trial may be suspended and a motion made to the court at special term for such purpose. (*Hochstetler* agt. *Isaacs*, ante, 495.)
7. Until the report of a referee is confirmed, and judgment entered thereon, the plaintiff obtains no vested right thereunder. Until then, it is subject to the power of the court, and to any law the legislature may think proper to pass, affecting the remedy. (*Lewen-*

thal agt. *The Mayor, &c., of New York*, 61 Barb., 511.)

See NEW YORK (CITY OF.) (61 Barb.)

8. So much depends on the appearance and conduct of a witness, before a referee, that it is never safe to interfere with a finding on a question of fact, unless it is so flagrantly unjust as to show partiality, corruption or incompetency, on the part of the referee. (*Per MULLIN, J.*) (*Howell* agt. *Biddlecom*, 62 Barb., 131.)

RELIGIOUS SOCIETIES.

See CORPORATIONS. (62 Barb.)

REPRESENTATIONS.

See INSURANCE, (FIRE.) (62 Barb.)

See VENDOR AND PURCHASER. (62 Barb.)

RE-TRIAL.

1. A re-trial may be had in all cases brought into the county courts, by appeal, without reference to the form of the action, when the claim or claims for judgment made by the pleadings of either party shall exceed the sum of fifty dollars. (*Merrill* agt. *Pattison*, ante, 289.)
2. And also in actions for the recovery of specific personal property, where no claim or claims exceeding that amount may be made, provided the damages actually recovered, added to the assessed value of the property, shall exceed that sum. (*Id.*)

REVIVOR.

1. In an action in the nature of *scire facias* to revive a judgment and obtain execution against the property of a deceased judgment debtor, his personal representatives and heirs at law, cannot be joined as co-defendants. (*Strong* agt. *Lee*, ante, 60.)
2. The personal estate of the deceased must be exhausted before resort can be had to the realty. (*Id.*)
3. In case of such joinder of defendants the court cannot, under the last clause of section 172 of the Code, order the action to be divided into two actions. (*Id.*)
4. When a judgment creditor dies and his executor is appointed, who, within a year from the death, applies by affidavit to the court, without notice to the judgment debtor, and obtains an order

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reviving the judgment in the name of the executor, and authorizing an execution on which real estate is afterwards sold :

Held, in an action of ejectment by the purchaser, that the execution was voidable not void, and one not holding under the judgment debtor could not raise the question. (*Nims agt Sabine, ante, 252.*)

2. In such case the sale is good, though more than ten years have elapsed since the docket of the judgment, and no lien is necessary to authorize a sale as against the defendant in the execution or trespassors. (*Id.*)
3. When defendant is in possession, without right, after the determination of a life estate, no notice to quit is necessary. (*Id.*)
7. An action brought against defendants as indemnitors of the sheriff, for damages in trespass in taking and carrying away plaintiff's goods under process of the court directed against a stranger, survives and continues after the death of one of the defendants; and on the application, by motion, on the part of the plaintiff the action may be revived against the administratrix of the deceased defendant, and continued in her name. (*Heinmuller agt. Gray, ante, 260.*)

S.

SALES.

1. Whether a delivery under an agreement for the sale of chattels is absolute or conditional, depends upon the intent of the parties; to establish that the delivery was conditional, it is not necessary that the vendor should declare the conditions, in express terms, at the time of delivery. It is sufficient if the intent of the parties can be inferred from their acts, or the circumstances of the case. (*Hammett agt. Linneeman, 48 N. Y., 399.*)
2. Although delivery, without requiring payment, is presumptive evidence of the waiver of a condition that payment should be made upon delivery to vest title in the vendee, yet this presumption may be rebutted by the acts or declarations of the parties showing a contrary intent; and the intent, where any doubt arises, is a question of fact. (*Id.*)
3. Plaintiff sold to defendant L. a quantity of coal for cash on delivery; L.

asked for a credit, which was refused; plaintiff knowing that L. was about failing. The coal was delivered and carted to L.'s yard, and mixed with other coal. Three days after delivery plaintiff again called for payment; not obtaining it, he called again in two or three days; L. stated he could not pay. The agent learning that L. had sold out, asked him what he had done with plaintiff's coal. He admitted he had sold it, adding he could not help it. Declarations of defendant were testified to, tending to prove that L. had given to defendant B. a bill of sale of the coal, before delivery. When the sheriff seized the coal under process in this action, L. said; "It looks so much like a swindle, I am ashamed of it."

Held, that there was sufficient evidence to justify the finding that the payment of the price was a condition precedent to the vesting of the title in L., and that such condition had not been waived. (*Id.*)

See FRAUDULENT CONVEYANCES. (48 N. Y.)

STATUTE OF FRAUDS. (*Id.*)

4. The defendant agreed to take the plaintiff's crop of hops, then present, dried, and gathered in heaps, and made part payment of the price asked, but the plaintiff was to bale and deliver at a time and place named, and did then and there tender the hops in bales, when it appeared that heated and moulded hops, part of the lot in question, had been negligently pressed by the defendant in some of the bales, rendering the good hops almost worthless; *Held*, that the defendant was at liberty to refuse to receive the hops, or any of them. (*Keeler agt. Vanderve, 5 Lansing, 313.*)
5. *Held*, further, that the title to the hops remained in the plaintiff at the time of the tender. (*Id.*)

SEWERS.

See NEW YORK (CITY OF.) (61 Barb.)

SHERIFF.

1. A sheriff having returned a warrant of attachment as "merged in execution," and also having returned the execution, *nulla bona*, is concluded by such returns, and has no further rights or powers by virtue of having had the attachment. His powers terminated with the return of the process. An alias execution subsequently issued,

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could not revive them. (*Clarke* agt. *Goodridge*, ante, 226.)

2. The sheriff served a copy of an attachment on the Bank of the Republic, with a notice showing that he levied on "the bank account of the defendant, Goodridge, and any debt due or owing from the bank to him." At the time of this levy nothing was owing to Goodridge from the bank, and nothing remained to his credit in the bank account; but certain stocks of Goodridge were in pledge to the bank for loans, which stocks at the time were worth no more than the bank had loaned upon them. Subsequently an advance in stocks enabled the bank to sell them, so as to realize a balance which was passed to the credit of Goodridge in the bank account. After such sale no further levy was made by the sheriff, but instead thereof he had returned the process. *Held*, that the debt had not been attached, as it was not in existence at the time of the levy; and as no levy was made after, it was a subsisting debt. (*Id.*)
3. The notice served by the sheriff, was a sufficient compliance with § 235 of the code. *Per DANIELS and JAMES, JJ.* (*Id.*)
4. The sufficiency of the notice was not in question in the case. *Per GROVER and LOTT, JJ.* (*Id.*)
5. The notice was insufficient. *HUNT, Ch. J.* (*Id.*)
6. A receiver in supplementary proceedings in *Clarke's* action, having become vested with all the personal estate of the judgment debtor, including debts owing to him (*Code*, § 298), at a time when no process was in the sheriff's hands, it was *held*, that the receiver was entitled to the property. (*Id.*)
7. In an action for the recovery of possession of personal property, the defendant was arrested under the provisions of subdivision 3 of section 179 of the Code, and, upon giving the undertaking required by sec. 187 in such cases, was released from arrest by the sheriff, who thereupon returned the order of arrest to plaintiff's attorney. Plaintiff excepted to the bail; they failed to justify, but prior to the expiration of the time for justification, surrendered the defendant to the sheriff, in whose custody he remained. Plaintiff subsequently recovered judgment for the delivery of the property, or payment of its value, with costs. *Held*, that the surrender by the bail was unauthorized, and did not exonerate them, and that, under section 201 of

the Code, the sheriff was liable as bail; which liability was not satisfied by having the defendant within his custody, amenable to process, but that, as far as the plaintiff was concerned, he stood in the place of the bail in the undertaking given to him, and the extent of his liability was measured by theirs. (*McKenzie* agt. *Smith*, 48 N. Y., 143.)

8. Where a deputy sheriff, after he had returned an execution *nulla bona*, with the consent of the plaintiff's attorney and the county clerk, procured the same from the clerk's office, erased the return, and, by virtue thereof, levied upon and sold property: *Held*, that the execution was irregular, but not void, and that the deputy having treated it as valid process, neither he nor his principal could refuse to answer for the money collected thereon. (*James* agt. *Gurley*, 48 N. Y., 163.)
9. It is the right of a sheriff to postpone a sale of property on execution, from time to time, and for such a length of time as he may deem proper. But he may not, for his own gain, bind himself by a contract, not to sell for such a period of time as will prevent him from obeying the command of his process. (*Perkins* agt. *Proud*, 62 Barb., 420.)
10. He is bound, without compensation, to give every indulgence consistent with obedience to his process; and when he contracts for delay beyond what is consistent with his duty, he is contracting for compensation or indemnity for breach of it; and such a contract is unlawful and void. (*Id.*)
11. Where a sheriff levies on property in which a third person has an insurable interest, and the latter insures the property, and the same is destroyed, and the insurers pay to the assured the amount of the loss, the sheriff has no right to claim a portion of the money, without showing that his interest has ever been insured. (*Id.*)
12. Upon the death of an ex-sheriff after his successor has been elected or appointed, his under sheriff is vested with the powers remaining in his principal to execute the unfinished business of the latter's office. (*Newman* agt. *Beckwith*, 5 Lansing, 80.)
13. And the late ex-sheriff's estate and sureties, alone, are liable to a party injured, for the defaults and misfeasances in office of his under sheriff, happening after his principal's death. (*Id.*)

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SHIPPING.

1. The provision in the State Constitution, that no person shall be deprived of property, &c., without due process of law (art. 1, § 6), does not require a legal proceeding according to the course of the common law, nor must there be a personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on, and an opportunity offered him to defend. The opportunity to defend must not be colorable and illusory; but it matters not, though it may be difficult, so long as it is not impracticable. (*Happy* agt. *Mosher*, 48 N. Y., 318.)
2. The act of 1862 (chap. 482, Laws of 1862), providing for "the collection of demands against ships and vessels," is not repugnant to the above mentioned provision, as it provides a reasonable notice and gives an opportunity to litigate the lien. (*Id.*)
3. An omission to state in the application to the county judge the time and place of filing the specification of the claim, does not invalidate the proceedings under that statute where the vessel has not departed from the port. (*Id.*)
4. The giving of the bond required by the act is a waiver of any technical defect in the prior proceedings. (*Id.*)
5. The obligation of the bond can only be discharged by showing that no debt was due or that no lien existed. (*Id.*)
6. Where the person furnishing the lumber accepted the note of the contractor building the vessel for the amount of the claim payable in three months:
Held, that this extended the time of payment in the absence of an agreement that it should not have that effect, and until the note was due proceedings could not be instituted under the act to enforce its collection. (*Id.*)
7. In an action upon a bond given under the provisions of said act, in order to prove that the lumber was used in the construction of the vessel, the plaintiff was permitted to prove, under objection, the declarations and admissions of the contractor and his agent, made after the delivery of all the lumber:
Held, error; that the contractor was in no sense the agent of the owner, and there was no such relation between them as to make his declarations com-

petent against the latter or his sureties. (*Id.*)

See INSURANCE. (48 N. Y.)

SLANDER.

1. The complaint in an action of slander, where the words charged are not actionable *per se*, must allege special damage. A general allegation that the slanderous charge injured the plaintiff in her good name, and caused her relatives and friends to slight and shun her, is insufficient. (*Bassell* agt. *Elmore*, 48 N. Y., 561.)
 2. Under a single count in an action of slander, plaintiff may prove a repetition of the same slanderous charge, for the purpose of showing the degree of malice, and thus enhancing the damage. So, also, when the words charged are not actionable *per se*, but the plaintiff has alleged and proven special damage, she may show a repetition of the charge, although not spoken in the presence or brought to the knowledge of one through whose action plaintiff sustained the special damage. (*Id.*)
 3. The doctrine that an action of slander for words not actionable *per se*, cannot be maintained unless spoken in the presence, or brought directly to the knowledge of the one who acted upon them, to the pecuniary injury of plaintiff, as laid down in *Keenholtz* agt. *Baker* (3 Denio, 346), questioned. (*Id.*)
 4. Plaintiff charged the paternity of her bastard child upon defendant's son:
Held, that the fact that defendant was engaged in an attempt to settle the matter between plaintiff and his son did not authorize him to blacken her character; and a charge made by him while so engaged, that she was a public prostitute, was not a privileged communication. (*Id.*)
- See CONTRACTS. (48 N. Y.)
PARTIES. (*Id.*)

SPECIAL VERDICT.

See PRACTICE. (62 Barb.)

SPECIFIC PERFORMANCE.

1. A purchaser in possession of real estate, under a contract to purchase, cannot surrender possession in order to rescind the contract. *Coray* agt. *Mathewson*, ante, 80.)
2. Neglecting to rescind, and yet retain-

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ing the possession, he cannot be permitted to insist upon the vendor's breach of the contract to deliver a title called for under it, as a defense to the vendor's action for a specific performance, if the vendor is able at the trial to make such a title to the premises as the purchaser is entitled to receive under the contract. (*Id.*)

3. Nor can a purchaser retaining possession, successfully resist the payment of the purchase money. (*Id.*)

Held, that the search which plaintiff was to furnish was required to show that the plaintiff's title was free from all incumbrances, and such was the intention of the parties by the provisions of the agreement.

Held, also, that the defendant is, by his contract, entitled to a title of record, and if the evidence fall short of establishing such a title, he is not bound to accept it unless he has estopped himself from insisting on such a title. (*Id.*)

4. The court will not compel the defendant to take a title which is *prima facie* defective and which he may not be able to sustain in an action brought to annul it. (*Id.*)

Held, that the taking and retaining possession of the premises by the defendant does not estop him from disputing the plaintiff's title. (*Id.*)

5. Where the defect in the title is such as necessarily to lessen the value of the property it would not be held waived except upon the most conclusive evidence that it was his intention to do so. (*Id.*)

STARE DECISIS.

1. Where a disputed question of fact has been fully submitted to the jury, their verdict thereon cannot be disturbed upon any opinion which may be entertained by the court on a review, as to which way the conflict should have been decided. (*Head* agt. *Smith*, ante, 476.)

2. Where the plaintiff reads a portion of the defendant's answer to the jury as evidence to contradict the witnesses of the defendant, and the jury, notwithstanding, find the facts in accordance with the defendant's witnesses, the objection of the plaintiff that the defendant by his answer is estopped from setting up these facts, cannot prevail to disturb the verdict of the jury. (*Id.*)

Held, that the defense in this case, that the promissory note upon which the

action was brought was procured by fraud, and that the plaintiff was not a *bona fide* holder for value without notice, could not be sustained. (*Id.*)

STATUTE OF FRAUDS.

1. A contract of sale of goods is void by the statute of frauds where there is no part payment of the purchase money, nor note, or memorandum of the contract, nor unless the purchasers both accept and receive the goods purchased, or some part thereof. (*Stone* agt. *Browning*, ante, 131)
2. It is not sufficient to bar the statute that the goods were delivered to the purchasers; they must also have accepted them. A delivery of property to satisfy the requirements of the statute of frauds, must be a delivery by the vendor with the intent of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking possession as owner. (*Id.*)
3. In this case the evidence showed that the defendants, the purchasers of the cloth from the plaintiffs, had not sufficient opportunity to examine the cloth while it was in the store of the plaintiffs, and hence it was arranged that it should be taken to the store of the defendants, and they were to examine it within one week, and if they were satisfied as to the quantity and quality of the cloth, then they were to give their note for the purchase price. They did take the cloth, and examine it, and after the examination, refused to accept it.

Held, that the defendants did not take possession of the goods as owners, and it was, not the intention of the parties that the title in them should vest in the defendants before they examined them and gave their notes. (*Reversing S. C.*, 49 Barb., 244.) (*Id.*)

4. A parol contract to manufacture and deliver a quantity of paper, such paper to be thereafter manufactured at the contractor's mills, is not within the provisions of the statute of frauds. (*Parsons* agt. *Loucks*, 48 N. Y., 17.)
5. A verbal agreement for the sale of property void by the statute of frauds cannot be ratified by an assignment by the vendor of an account against the vendee therefor. The sale can only be rendered valid by the concurrence of both the vendor and the vendee in some one of the things required by the statute to give it validity. (*Hicks* agt. *Cleveland*, 48 N. Y., 84.)

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6. A parol promise to assume an antecedent debt of a third person, upon consideration that the creditor will cancel and extinguish the debt and release the debtor, which is done, is not within the statute of frauds, and is valid. (*The M. B. Co. agt. Zingsen*, 48 N. Y., 247.)

7. A contract to cut trees standing upon the contractor's land into cord-wood, and to deliver the wood at so much per cord, is not a contract for the sale of an interest in lands, and a writing is not necessary to give it validity. (*Killmore agt. Howlett*, 48 N. Y., 509.)

8. Where a verbal agreement is entered into for the work and labor of one of the parties for a year, to commence in futuro, an entry upon the employment, with the acquiescence of the employer, but without a new contract, does not take the case out of the statute of frauds, and the employer is not liable under the contract. (*Oddy agt. James*, 48 N. Y., 685.)

See *Brand agt. Brand (Mem)*, 48 N. Y., 675.)

STATUTE OF LIMITATIONS.

1. It is the well stated rule that it is pretty much a matter of course to permit parties to amend their pleadings before trial, when the amendment will produce no delay of the trial, nor work any especial hardship to the adverse party. The terms imposed are usually the payment of the costs of the motion, and such other costs and expenses, if any, as the party will lose by reason of the desired amendment.

Held, on this motion, that the defendant be allowed, under the above rule, to amend his answer by setting up the statute of limitations. (*Gilchrist agt. Gilchrist's Ex'rs.*, ante, 317.)

2. It is the duty of the Court to put statutory defenses, such as the statute of limitations, usury, &c., upon the same footing with other legal defenses. (*Id.*)

See *LIMITATION OF ACTIONS*. (48 N. Y.)

The statute of limitations of this state is applicable to a contract made in a foreign state. (*Murray agt. Fisher*, 5 Lansing, 98.)

3. Where the maker and payee of a note made in Pennsylvania resided there, but afterward removed into this state and the former returned to Pennsylvania after a three years' residence here;

Held, that the statute of limitation ceased to run with the maker's return to Pennsylvania, and that this was so notwithstanding he frequently came back and was openly in this state, with knowledge of the payee. (*Id.*)

4. In an action on an account which had accrued in 1868 and 1869, the defendant claimed to offset an account against the plaintiff running from 1855, but of which the last item accrued in 1863; *Held*, there was a mutual running account between the parties, and that the offset was not barred by the statute of limitations. (*Helms agt. Otis*, 5 Lansing, 137.)

5. The limitation for ten years prescribed for commencement of actions by section 17 of the Code, applies to the action of a judgment creditor to redeem property sold under mortgage. (*TALCOTT, J.*, dissenting.) (*Hubbell agt. Sibley*, 5 Lansing, 51.)

6. It seems that section 97 is applicable to all purely equitable action, except those for relief on the ground of fraud. (*Id.*)

7. Prior to the amendment to section 101 of the Code in 1870, the statute limitation, in cases other than those excepted by that section, began to run against a married woman, continuing the coverture, only after five years. (*Dunham agt. Sage*, 5 Lansing, 451.)

8. And if she died before the expiration of five years, her representatives had the full time limited by statute, in which to bring an action upon a claim which survived to them.

See *ACCUMULATION*. (5 Lansing.)
ESTOPPEL. (*Id.*)

STATUTES.

1. The last clause of section 1 of the "Act to amend the Revised Statutes in respect to highways" (Laws of 1861, chap. 311), which provides, that all highways that have ceased to be traveled or used as such for six years, shall cease to be highways for any purpose, is not limited by the second section or said act to highways "laid out and dedicated," but applies as well to highways created by twenty years' user. Said clause, however, is not retroactive in its effect, but only applies to such highways as have ceased to be traveled or used for six years after the passage of the act. (*Amsbry agt. Hinds*, 48 N. Y., 57.)

2. The provisions of section 8 of the act in relation to moneyed corporations (1

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R. S., p. 591), which provide that no conveyance, &c., of the real estate and effects of such corporation, exceeding \$1,000 in value, shall be made, unauthorized by a previous resolution of the board of directors, do not apply to a sale, by the financial officers of a bank, of mortgages or other securities pledged to secure a loan, made to realize the money secured by the pledge. (*Com. Bank agt. Ten Eyck*, 48 N. Y., 305.)

3. The provisions of the act "to subject certain debts due to non-residents to taxation" (chap. 371 of the Laws of 1851), providing that debts due from the inhabitants of this state to non-residents for the purchase of real estate shall be assessed in the name of the creditor and taxed in the town or county where the debtor resides, is applicable only to taxation in towns; and as to taxation in villages, the general law authorizing assessments to agents (1 R. S., chap. 13, title 1, § 5, as amended in 1851), remains in force. (*People ex rel. agt. Trustees of Ogdensburg*, 48 N. Y., 390.)

4. Where the lands are taken under a statute authority in derogation of common law right, every requisite of the statute having a semblance of benefit to the owner must be complied with. (*Newell agt. Wheeler*, 48 N. Y., 486.)

5. An assessment upon the shares of a national bank, under the act of 1865 (§ 10, chap. 96, Laws of 1865), is invalid and cannot be enforced. (*First Nat. Bank of Salem agt. Fancher*, 48 N. Y., 524.)

6. The control conferred upon congress by the Constitution of the United States (art. 1, § 8), over the state militia, begins when they are mustered into the service of the United States. Arrangements by the states to procure or aid in calling them forth are not unauthorized, nor are regulations fixing and limiting the amount of bounties or rewards given to procure their services; therefore, section 4 of chapter 29 of the Laws of 1865, which prohibits the payment of any sums for the procurement of volunteers, save as provided for by that act, is not in conflict with the Constitution of the United States, and an agreement to pay a sum prohibited by that section is void. (*Powers agt. Shepard*, 48 N. Y., 540.)

7. Where several statutes in *part materia* are passed by the same legislature, they are to be taken and construed together. (*Id.*)

See CORPORATION. (62 Barb.)
FRAUDS STATUTE OF. (*Id.*)
HUSBAND AND WIFE. (*Id.*)
LIMITATIONS, STATUTE OF. (*Id.*)
PARTIES. (*Id.*)
RAILROAD CORPORATION. (*Id.*)
TOWNS (*Id.*)

STATUTES CONSTRUED.

1. Chapter 648 of Laws of 1866 does not embrace more than one subject, and that is expressed in its title. (*Matter of Rondout & Oswego R. R. Co. agt. Deyo*, 5 Lansing, 298.)

STEAMBOATS.

1. The acts of congress providing for the better security of the lives of passengers on board of vessels propelled by steam, &c. (act of July 7, 1838, amended by act of August 30, 1852), does not take away or impair the common law right of action by a person injured, while a passenger upon such a vessel. (*Swarthout agt. N. J. Steamboat Co.*, 48 N. Y., 209.)

STOCK.

See PRINCIPAL AND AGENT. (62 Barb.)

STREAM.

See GRANT. (62 Barb.)

SUCCESSORS IN OFFICE.

1. Where a *highway commissioner* has received notice of the unsafe character of a *bridge* in his town, a year before an alleged injury has been sustained by reason of its defects, and has negligently omitted to cause it to be repaired, such commissioner is guilty of a wrong rendering him liable for all its consequences to those who might be injured by it. (*Lament agt. Haight*, ante, 1.)

2. It is the commissioner's wrong exclusively, and not that of his successors in office, and he may be sued for it as a mere individual, relying upon his official obligation to establish the duty he has violated. (*Id.*)

3. Such a case is, therefore, not one where the action could be *continued* against his successor in office. (*Id.*)

4. If the requisite notice has been given the commissioner, and he has funds, on could by reasonable official diligence

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have procured them, or without them could have caused the bridge to be repaired on the credit of the town, he is bound to have the repairs made, and a failure to do so, resulting in an injury to another, will render him liable to an action. (*Id.*)

5. But the commissioner is not bound to make use of his own personal exertions to repair the bridge himself, or so far guard it by means of admonitions to the persons using it, as would inform them of its condition in order to protect himself against liability for injuries which might be otherwise occasioned. (*Id.*)

SUICIDE.

1. There is no presumption of law that a person who commits suicide was insane, or that the fact of suicide is *prima facie* evidence of insanity (FREEDMAN, J. dissenting. See his opinion). (*Coffey* agt. *The Home Life Ins. Co.*, ante, 481.)
2. Aside from extrinsic facts and circumstances, the law presumes that every person who destroys his own life, is sane up to the very moment when he does the act which causes his death. It cannot therefore be properly said that the commission of that act, not only removes the presumption of sanity, but establishes a legal presumption that he was then insane (*Per BARBOUR, Ch. J.*). (*Id.*)

SUPERIOR COURT OF BUFFALO.

1. The Superior Court of the city of Buffalo has jurisdiction of an action against the Board of Supervisors of Erie county, where the summons is served upon the chairman or clerk of the board in that city. (*The B. & S. L. R. R. Co.* agt. *Supervisors*, 48 N. Y., 93.)

SUPERVISORS.

1. A party has no right, without showing any cause except his own will, to substitute one attorney for another, without the payment of the costs earned. And this rule applies to a board of supervisors. (*Board of Supervisors*, agt. *Brodhead*, ante, 411.)
2. Where a board of supervisors, by their vote, discharge a firm of attorneys who have been acting in their employ (so far as their vote can discharge them) merely because the supervisors choose so to do, with a view to substitute another attorney for the board, they

must pay the firm of attorneys their reasonable claims, which may be ascertained by a reference. And the attorneys are not bound to consent to a substitution or to deliver the papers upon which they have a lien, until the amount of their just demands is ascertained by the court or a referee, and paid them. (*Id.*)

See MANDAMUS. (62 Barb.)

SUPPLEMENTARY PROCEEDINGS

1. A watch is property liable to execution. (*The Deposit Nat. Bank* agt. *Wickham*, ante, 421.)
2. A judgment debtor in proceedings supplementary to execution, while the order is in force, has no right to violate it by transferring his property to employ an attorney for him in such proceedings. The creditors lien is prior to the attorneys. (*Id.*)
3. Sections 292 and 294 of the Code furnish a substitute for the creditor's bill, as formerly used. The service of the order, under those sections, takes the place of the commencement of a suit under the old system, and gives the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of the debtor. (*Lynch* agt. *Johnson*, 48 N. Y.)
4. A final order of a judge, in proceedings under section 294, requiring the debtor of a defendant to pay his debt to the plaintiff, renders this lien effectual; and payment, or liability to pay, in pursuance of such order, is a defense to the debtor in an action against him by his creditor, or by an assignee who is not shown to be a *bona fide* purchaser for value of the claim, prior to the accruing of the lien. (*Id.*)
5. A judgment recovered by a debtor against his creditor for an unlawful levy upon and sale of exempt property, cannot be reached by the creditor through proceedings supplementary to execution. Such judgment represents the property for the value of which it was recovered. The proceeds of the judgment will be protected as exempt property until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the exempt property. (*Tillotson* agt. *Wulcott*, 48 N. Y., 188.)

SURETIES.

1. Each surety on a bond, given by a non-resident plaintiff on commence

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ment of an action must *justify*, if excepted to. The justification of one surety only is sufficient. (*Lake* agt. *Arnold*, ante, 332.)

2. Where an administrator's bond is assigned by the surrogate for the purpose of being prosecuted under the act of 1837, the action may be brought in the name of the assignee as the real party in interest, under § 111 of the Code. If sued in the name of the people, as the nominal obligees, the Code, under § 113, allows the action to be brought in that form. (*Cridler* agt. *Curry*, ante, 345.)
3. Before the Code, joint and several obligors must have been sued either all jointly, or each one severally. But under § 120 of the Code, all or any of the obligors be included in the same action. (*Id.*)
4. Therefore, where the plaintiff sued only two of the four sureties to the administrators' bond, *held* that the action was authorized by § 120 of the Code.

SURROGATE.

See APPEAL. (65 Barb.)

EXECUTORS AND ADMINISTRATORS.
(*Id.*)

1. A surrogate's power to enforce "all lawful orders, processes, &c., by attachment against the person (2 R. S., 221, § 6, sub. 4), does not authorize him to inflict a fine and then commit upon the fine. (*Matter of Abram E. Watson*, 5 Lansing, 466.)
2. The precept "used by the Court of Chancery in analogous cases" (*id.*), was the ordinary execution against the body in the nature of a *capias ad satisfaciendum*. (*Id.*)
3. It seems that imprisonment by fine being the most punitive in its character, was purposely avoided by section 6, sub. 4, 2 R. S., 220. (*Id.*)
4. It seems the practice of filing written interrogatories and giving the party an opportunity of answering them in proceedings for commitment is demanded only in cases where punishment can be inflicted by fine. (*Id.*)

See GIFT. (5 Lansing.)

T.

TAXES AND ASSESSMENTS.

1. It has been settled by authority that an action in equity may be maintained

to prevent a cloud to be cast upon real estate, as well as to remove a cloud already created. (*Mann* agt. *City of Utica*, ante, 334.)

2. Consequently an action to restrain a city from proceeding to sell real estate under a prior assessment, which is claimed to be irregular under the city charter, is properly brought by the owner of the property. (*Id.*)

Held, that the clear purport and intent of the act was to validate and make good the assessment, and charge the assessment upon the lands of the plaintiffs as well as the other owners of property benefited. (*Id.*)

3. The act referred to is entitled as follows: "An act to confirm an assessment for the expense of paving Broad street, in the city of Utica," passed May 16, 1872. This act is not unconstitutional and void. Because, 1st. It is, as alleged, contrary to section 1 of art. 1 of the constitution. 2d. Because, as alleged, it is contrary to section 6 of art. 1. (*Id.*)

4. Neither is the act void, because, as alleged, it is a private and not a public act, and embraced more than one subject. (*Id.*)

5. Nor is the act invalid, because, as alleged, it is retroactive, or an *ex post facto* law. (*Id.*)

6. The plaintiffs having established, by the admissions of the pleadings and proofs, that when the action was commenced they were entitled to some relief from the court, the complaint ordered dismissed with taxable costs of the plaintiffs, recoverable of the defendants. (*Id.*)

7. A tax assessed for the expense of repairs and additions to a district school-house is valid, although the resolution of the district school meeting, which voted the repairs, &c., failed to specify the amount to be raised for the purpose. (*Hamlin* agt. *Dingman*, 5 Lansing, 61.)

See PUBLIC OFFICER. (5 Lansing.)

TELEGRAPH COMPANIES.

1. Although telegraph companies, organized under the general laws of this state and the acts amendatory thereof (chapter 265, Laws of 1848; chapter 599, Laws of 1855, &c.), may be termed common carriers in the sense that they are engaged in a public employment and bound to transmit all messages, the common law liability of common

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carriers does not attach to them. They do not insure the safe and accurate transmission of messages. They are bound to transmit them with care and diligence adequate to the business which they undertake. (*Breece* agt. *U. S. Tel. Co.*, 48 N. Y., 132.)

TENANTS IN COMMON.

1. One H. worked plaintiff's farm under a contract, in and by which plaintiff agreed to let the farm to H. to work on shares upon certain conditions, among others that plaintiff was to account and pay to H., in consideration of the premises, and for his performance, the value of one half of all the grain, &c., produced from the farm:

Held, that the parties were not tenants in common of the crops, but that plaintiff had exclusive title thereto. (*Tanner* agt. *Hills*, 48 N. Y., 662.)

See PARTITION. (48 N. Y.)
Pike agt. *Waller* (Mem.). (*Id.*)

TENDER.

1. Where on sale by execution from the Marine Court of New York city the judgment debtor tendered the amount of the judgment and sufficient to cover sheriff's fees, but the sheriff claiming the tender to be insufficient, concluded the sale; *Held*, that the tender was *prima facie* sufficient, and that the plaintiff in the execution, who was present bidding at the sale, and did not prohibit it, was liable for conversion of the property sold. (*Tiffany* agt. *St. John*, 5 Lansing, 153.)

TESTIMONY.

See APPRAISAL OF PROPERTY TAKEN FOR RAILROAD PURPOSES. (5 Lansing.)

TITLE.

1. One who furnishes the credit, and in whose name a business is carried on, is the legal owner of the property purchased upon his credit and employed in the business, although the beneficial interest in the business is in another. (*Smith* agt. *Van Olinda*, 48 N. Y., 169.)
2. A person upon whose lands a tree wholly stands is the owner of the whole thereof, and is entitled to all its fruit, notwithstanding some of its branches overhang the lands of an-

other. (*Hoffman* agt. *Armstrong*, 48 N. Y., 201.)

3. When one purchases land, and at his request the same is deeded to another, although the purchaser receives and retains the deed, without disclosing the existence thereof to the grantee, and takes and retains possession of the land, yet by the deed the title passes and becomes vested in the grantee, and under the prohibitions of the statute of uses and trusts (1 R. S., 728, § 51) no trust results in favor of the purchaser. (*Everett* agt. *Everett*, 48 N. Y., 218.)

TITLE TO CHATTELS.

1. Where attorneys-at-law received notes and a mortgage of real estate from parties who had taken them as security for the loan of moneys realized upon sale of bonds which they had stolen, and so received them as indemnity for legal services in defending the assignees in civil and criminal proceedings growing out of the larceny; *Held*, that they were liable to the owners of the bonds for the proceeds of the securities received, beyond the value of services rendered previously to notice of the fact that notes and mortgages represented moneys realized from the stolen bonds. (*Newton* agt. *Porter*, 5 Lansing, 416.)

See SALE OF CHATTELS. (5 Lansing.)

TOLLS.

1. One who passes a turnpike or plank-road gate, without paying the toll, is liable for the penalty imposed by the statute; as his intention not to pay it is sufficiently indicated by the act itself. (*Rome and Oswego Road Company* agt. *Stone*, 62 Barb., 601.)
2. In an action to recover penalties, it is erroneous for the judge to charge the jury that when a credit has been given for tolls, and discontinued, and the passenger, being responsible and well known, tells the gate-keeper to charge the toll, if the company, thereafter, allows him to pass, the question will be whether the passenger intended to avoid payment, or merely to obtain, thereby, a credit; and that if the jury are satisfied that the defendant only intended to obtain a credit, he will not be liable in the action. (*Id.*)
3. A plank-road or turnpike company has two modes of enforcing the payment of toll by those passing its gates. One is by closing the gates, and pre-

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venting the traveller from getting through until he pays; the other by suing for the penalty those persons passing and not paying after demand of the toll. (*Id.*)

4. A passenger cannot, because he is responsible and well known, compel a plank-road company to give him a term of credit on tolls, contrary to a resolution of the directors. (*Id.*)

See MANDAMUS. (62 Barb.)

TOWN BONDS.

1. An injunction *pendente lite* will issue to restrain town officers from the issuing of bonds of the town for railroad purposes where it is alleged that the town had no authority to create such bonds by reason of a defect in the petition of the tax payers of the town. The county clerk's certificate is not conclusive evidence of such authority. (*Town of Rochester* agt. *Davis*, ante, 95.)

TRADE MARKS.

1. A manufacturer has the right to distinguish the goods manufactured by him by any peculiar mark or device he may select and adopt, by which they may be known as his in the market; and he is entitled to the protection of a court of equity, in the exclusive use of the peculiar marks or symbols appropriated by him, designating or indicating the true origin or ownership of the article to which they are affixed. (*Gillott* agt. *Esterbrook*, 48 N. Y., 374.)

TREES.

1. A person upon whose lands a tree wholly stands is the owner of the whole thereof, and is entitled to all its fruit, notwithstanding some of its branches overhang the lands of another. (*Hoffman* agt. *Armstrong*, 48 N. Y., 201.)

TRESPASS.

1. The owner of the soil in flat lands adjoining the shore of a navigable stream, over which the tide ebbs and flows, may maintain an action of trespass against one who, without his consent, enters upon and uses the same for fishing purposes, driving stakes therein, and mooring his boats there, and occupying the soil in drawing in seines and nets, so as to interfere with the rights of the plaintiff therein. (*Whittaker* agt. *Burkans*, 62 Barb., 237.)

See INJUNCTION. (62 Barb.)

TRIAL.

1. In an action on contract, and a general denial, at the close of the testimony on both sides, at the trial, the case presents a clear conflict as to the real agreement between the parties, and the defendant concedes such fact by omitting to move for the direction of a verdict, and by going to the jury without objection, he is too late, a new verdict rendered against him, to argue that the case presented no evidence to be submitted to the jury, or, at least, presented such a preponderance of evidence in his favor as to make it the duty of the court to direct the jury how to find. (*St. John* agt. *Skinner*, ante, 198.)
2. Where exceptions taken to the admission of testimony on the trial and to the judge's charge, are irrelevant, under the issues, and outside of the issues they could only become material by their tendency to establish, in connection with other facts to be introduced, the existence of a special agreement in avoidance or as a defense to the claim testified to by the plaintiff, it constitutes new matter, and not being specially pleaded, is properly excluded. (*Id.*)
3. On a motion for a new trial on the judge's minutes, no costs as for a motion can be allowed. The prevailing party is entitled only to a trial fee for the trial of an issue of fact. (*Muller* agt. *Higgins*, ante, 224.)
4. A trial fee of \$30 is taxable on the first and second trials each, where the jury disagreed on the first trial, but found a verdict for defendant on the second. (*Spring* agt. *Day*, ante, 390.)
5. A charge of \$15 for services after notice and before trial, not exceeding five term fees, is also taxable for each trial. (*Id.*)
6. Also a fee of \$10 is properly allowed where more than two days were occupied at each trial, for such trials. (*Id.*)
7. A charge for stenographer's fees for copy minutes of the first trial is not allowable. (*Id.*)
8. In an action for conversion of personal property, defendants justified under a judgment and execution against a third person who carried on business in plaintiff's name, as her agent, and with materials and labor purchased and procured upon her credit. The property levied upon was thus manufactured. Upon the trial defendants offered to

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prove that plaintiff allowed the execution debtor to use her name and credit to carry on business for his sole benefit. The court excluded the evidence. The court also refused to submit to the jury the question whether such an arrangement was fraudulent and void as to creditors:

Held, no error; that no fraud could be deduced therefrom. (*Smith* agt. *Van Olinda*, 48 N. Y., 169.)

9. The personal representatives of a deceased vendor are necessary parties to an action to compel a specific performance of his contract of sale. Where, however, the heir alone is made defendant, and the defect alone appears upon the face of the complaint, if no demurrer is interposed the defect is to be deemed waived, and his right to object is at an end. (*Potter* agt. *Ellice*, 48 N. Y., 321.)

TROVER.

See TRIAL. (48 N. Y.)

TRUST AND TRUSTEES.

1. C., the trustee of an express trust, brought an action of ejectment against defendant to recover possession of the premises deeded to him in trust. In the deed it was provided that the trustee might release or sell the trust estate only under the control and direction of the Supreme Court. For the purpose of discontinuing that action, C. executed a stipulation, under seal, containing this clause: "In consideration of the consent of defendant that this suit be discontinued, I hereby release him from all claims and demands of every description relating to the property." Upon this stipulation the court granted an order dismissing the complaint. C. having died, plaintiff was appointed trustee and brought ejectment. Defendant offered the stipulation in evidence, which was objected to and objection sustained.

Held, no error. The stipulation could not operate as a release or conveyance, as then it would be a conveyance in violation of the trusts, and the granting the order thereon was not a direction or sanction to such release or sale. (*Fitzgerald* agt. *Topping*, 48 N. Y., 438.)

2. Trustees, in whom is the title to a trust fund, are the proper parties plaintiff in an action to maintain and defend the fund against wrongful attack or injury, tending to impair its

safety or amount. Neither the *cestui que trust* nor beneficiaries can maintain an action against a third person, except in case the trustees refuse to perform their duty, and then the trustees should be made parties defendant. (*W. R. R. Co.* agt. *Nolan*, 48 N. Y., 513.)

3. Where a certain sum is bequeathed to executors in trust to pay the interest thereof at a fixed and stated rate to one, and upon his death to divide the principal among others, the executors cannot, without the consent of the *cestui que trust*, or, in case they are infants without an order of the court, set apart and appropriate bank stocks to the satisfaction of the trust, and release the residue of the estate from its liability to perform the trust. (*Leitch* agt. *Wells*, 48 N. Y., 585.)

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. (48 N. Y.)

4. A purchase of land in 1868, made for and with the money of three persons, in the name of one of their number, created a resulting trust in the latter in favor of the other two to the extent of their contributions. (*Trustees of Union College* agt. *Wheeler*, 5 Lansing, 160.)
5. Contracts of sale and conveyances by such grantee would bind the remaining owners as the acts of their agent. (*Id.*)
6. But contracts of sale made by the trustee under which no sufficient possession has been taken by the vendee, will be postponed to a subsequent mortgage of the premises in the hands of a *bona fide* assignee. (*Id.*)
7. And this is so, even although the assignor of the mortgage was chargeable with knowledge of the rights and equities of the vendee under the contracts. (*Id.*)

See ACCUMULATION. (5 Lansing.)

DEVICE. (*Id.*)

RAILROAD MUNICIPAL BONDS. (*Id.*)

TITLE TO CHATELS. (*Id.*)

TURNPIKE COMPANIES.

See TOLLS. (63 Barb.)

U.

UNDERTAKING.

1. On an appeal from a judgment entered by the direction of a single judge to the general term of the same court no

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security is required, but if a stay of proceedings is desired, an undertaking must be given, the same as required on an appeal to the court of appeals. (*Ritter* agt. *Krekeler*, ante, 445.)

2. Where an undertaking is filed at the time of the service of a notice of appeal for the purposes of a stay, which undertaking is disapproved, the appellant should move for leave to file and serve a new undertaking *nunc pro tunc* as of the time of filing the notice of appeal. (*Id.*)
3. The undertaking given by the plaintiff, upon the commencement of an action in a justice's court, for the recovery of the possession of personal property, conditioned "for the prosecution of said action, and the return of said property to the defendant, if return thereof be adjudged, and for the payment to the defendant of such sum as may, for any cause, be recovered against said plaintiff," extends to all proceedings and adjudications, in the same action, through every court to which it may be carried by appeal, in case the party giving the undertaking is finally defeated; and an action will lie thereon, after final judgment in the Supreme Court affirming a judgment against the plaintiff, recovered in the justice's court. (*Letson* agt. *Dodge*, 61 *Barb.*, 125)
4. And in an action brought upon such undertaking, it is erroneous to nonsuit the plaintiff on the ground that an execution has not been regularly issued and returned unsatisfied according to the provisions of the Revised Statutes relative to actions of replevin. (2 *R. S.* 533, §§ 64, 65. 3 *Id.* 848, 5th ed.) (*Id.*)
5. No consideration is necessary, to uphold an undertaking given upon a release of an attachment. (*Bildersee* agt. *Aden*, 62 *Barb.*, 175.)
6. The release of the property levied on is a sufficient consideration, if any is necessary; but where an attachment is issued, and an undertaking is given to discharge it, under the provisions of the statute, no consideration is necessary either to be inserted therein, or to be proven on the trial. (*Id.*)
7. For a statutory undertaking no consideration is necessary. (*Id.*)
8. Where the affidavit, on which an attachment is issued, is sufficient to call upon the officer to whom it is presented, to exercise his judgment in granting it, and the subsequent proceedings to set it aside do not raise

the jurisdictional question, the bond or undertaking given remains valid, although the attachment is set aside; unless the court expressly orders the undertaking, also, to be canceled. (*Id.*)

9. The party giving an undertaking cannot set up as matter of defense to an action upon the same, that the grounds on which the attachment was issued were not true. The giving of the undertaking concludes the parties, on that point. (*Id.*)

UNITED STATES COURTS.

See SHIPS AND SHIPPING. (61 *Barb.*)

USURY.

See MORTGAGE. (62 *Barb.*)

V.

VARIANCE.

1. After judgment, a variance between the complaint and the proof is immaterial. The court may, on appeal, order an amendment, so as to conform the allegations of the complaint to the evidence. (*Smith* agt. *Holland*, 61 *Barb.*, 333.)

VENDOR AND PURCHASER.

See ACTION. (61 *Barb.*)

AGREEMENT. (*Id.*)

WARRANTY. (*Id.*)

SHIPS AND SHIPPING. (*Id.*)

1. When a vendor, in a contract for the sale of land, covenants that he will execute and deliver to the vendee, his heirs and assigns, a deed of conveyance in fee simple, with a covenant against his own acts, and the premises are incumbered, at the time, by taxes assessed thereon and for some part of which a sale of the premises, for a term of years, has actually been had, the purchaser is justified in refusing to accept a deed and pay the purchase money, although a deed be tendered which is, in form, a compliance with the contract. (*Penfield* agt. *Clark*, 62 *Barb.*, 584.)
2. When a contract calls for a deed conveying a fee simple, it is not satisfied by giving a deed which conveys a fee incumbered by liens. (*Id.*)
3. In every contract for the sale of land there is an implied warranty that the vendor has a good title; unless the warranty is expressly excluded by the

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terms of the contract. The provision for a covenant in the deed against the vendor's own acts, is not an express exclusion of the implied covenant, and is not in any manner inconsistent with it. (*Id.*)

4. In an action to recover the price of goods sold and delivered on credit, there was no evidence to show any agreement about the delivery of the property by the vendors to the purchaser, or as to the manner in which, or the time when, it was to be made; or that the purchaser ever received the goods; or that he knew that they had been, or were to be, delivered to a railroad company for him. *Held*, that in the absence of some order, or agreement, on the part of the purchaser to have the property sent to him by railroad, or of some evidence in regard to usage, or the course of trade, from which an agreement to have it so sent might be inferred, a delivery to the railroad company was no delivery to the purchaser. (*Everett* agt. *Parks*, 62 Barb., 9.)
5. *Held*, also, that without some such evidence, a receipt for the property, given by the agent of the railroad company to the vendors, was no evidence against the purchaser that the property had been received by the company on his account. (*Id.*)
6. That before such a receipt could be made evidence to charge the purchaser, it was necessary for the vendors to show that they were authorized by the purchaser to send the property to him by that railroad company. (*Id.*)
7. Where the defendant does not appear on the trial of such an action, it is incumbent on the plaintiffs not only to prove a delivery of the property to the defendant personally, or to some person designated by him to receive it, but to prove it by competent and proper evidence; and if they fail in either respect, the defendant may take advantage of the error, on appeal. (*Id.*)
8. Upon the sale of a horse to the plaintiff, by the defendant, the horse was represented and warranted by the latter to be sound, at that time, although the fact was disclosed that there had been a previous unsoundness. In an action to recover damages for a fraudulent warranty, the referee found that the horse appeared sound at the time of the sale, but that he was in fact unsound, at that time, and the unsoundness afterwards became more developed, and was exhibited by occasional lameness, so as seriously to impair the value of the horse. *Held* that if the defendant told the plaintiff the whole truth, in regard to the condition of the horse, he was not liable for fraud on the sale. (*Howell* agt. *Biddiscom*, 62 Barb., 431.)
9. If a seller knows of a defect in his goods which the buyer does not know, and if he had known, would not have bought the goods, and the seller is merely silent, his silence, although a moral, is not a legal fraud. (*Id.*)
10. Where vendors refuse to deliver to the purchasers the property sold, and sell the same to other persons, this renders it unnecessary for the purchasers to offer to pay the unpaid portion of the purchase price, before suing for damages. (*Hawley* agt. *Keeler*, 62 Barb., 231.)
11. Although the rule is well settled that a purchaser of personal property cannot defeat a recovery for the price by showing that the property is owned by another, unless he has been ousted, or there has been a recovery by the true owner; yet there is this important qualification to the rule—that if the seller has been guilty of fraud or deceit, in the sale, proof of the fraud will defeat an action for the price, although there has been no ouster, nor recovery had by the true owner. (*Sweetman* agt. *Prince*, 62 Barb., 256)
12. The general rule is, that a sale of chattels is not complete, so as to vest title to the property purchased in the vendee, until delivery by the vendor. It is also a rule equally general that title does not pass while anything remains to be done by the vendor in order to ascertain either the quantity or price of the thing agreed to be sold. (*Halterline* agt. *Rice*, 62 Barb., 593.)
13. These rules apply not only to property *in esse*, but also to that which is thereafter to be manufactured. (*Id.*)
14. In the case of a contract to manufacture goods and then sell them, it is a general rule that no property in the material passes to the purchaser until the article has been finished and delivered, or is ready for delivery, and appropriated to the benefit of, or set apart for, the purchaser, with his assent, and accepted by him. (*Id.*)

CRIMINAL LAW. (62 Barb.)

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VERDICT.

1. Where the amount of a verdict is determined by mere conjecture, and is not based upon any calculation warranted by the testimony, it will be set aside, as unsupported by sufficient evidence. (*Bauder* agt. *Lasher*, 5 *Lansing*, 335.)

W.

WAGER.

1. In an action against a stakeholder to recover money deposited with him as a bet or wager upon the result of a horse race, it must appear that there were two or more contracting parties having mutual or reciprocal rights to the money or things wagered. (*Jordan* agt. *Kent*, *ante*, 206.)
2. The plaintiff in this case put into the defendant's hands, who was secretary of a driving association, \$60, as an entrance fee, to entitle him to trot his horse over the race course in competition with other horses for two purses of \$300 each. The plaintiff trotted one of said races, and was beaten, and the other race was withdrawn on account of bad weather, and the association tendered the plaintiff \$30, which he refused to receive. (*Id.*)
3. In an action against the defendant to recover the \$60 thus deposited, *held*, that there was not any such contract of wager between the plaintiff and defendant as could sustain the action. (*Id.*)

WAIVER.

1. Where a judgment is entered against a defendant, on contract, by default, and the defendant is afterwards several times examined in supplementary proceedings thereunder, without objection to the regularity of the judgment, he cannot on motion, made some twenty years afterwards, have the judgment set aside on the ground that he was an *infant* when the judgment was entered and that no *guardian ad litem* had been appointed for him in the action. His delay waived the irregularity in the entry of the judgment. (*Howard* agt. *Dusenbury*, *ante*, 423.)
2. The mere occupation of a building, by the owner, is not a waiver of strict performance by the builder. The question of waiver is one of intention,

depending on the circumstances. (*Wells* agt. *Selwood*, 61 *Barb.*, 238.)

3. Where an action is commenced to compel the determination of conflicting claims to real property, a defendant, by appearing and taking part in the proceedings to judgment without objection will be held to have waived any objections to the regularity of the proceedings, and cannot thereafter object that the proceedings should have conformed to the provisions of the Revised Statutes as amended. (*Fisher* agt. *Hepburn*, 48 *N. Y.*, 41.)

WARRANTY.

1. Where an auctioneer states, at the time of sale, "here are 25 barrels of blue vitriol, sound and in good order," it is a warranty to the purchaser that the article is sound and in good order, and that it is *blue vitriol*. (*Hawkins* agt. *Pemberton*, *ante*, 102.)
2. And it is error for the court below on the trial to withhold this evidence of warranty from the jury, when properly requested to submit it to them. (*Id.*)
3. Where the principal, and, in fact, the only questions submitted to the jury, were whether the cloth sold by the plaintiffs to the defendants was sold by sample with a warranty, and whether it corresponded with the sample, the decision of the jury thereon cannot be disturbed. (*Stone* agt. *Browning*, *ante*, 131.)
4. It is only where an article is contracted for to be applied to a particular purpose, and in such manner that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, and not to his own, that there is an *implied warranty* that it shall be reasonably fit for the purpose to which it is to be applied. (*The Charlotte, Columbia & Augusta R.R. Co.*, agt. *Jesup*, *ante*, 447.)
5. An agreement, by the defendant, to make and finish, for the plaintiff, "in a good and workmanlike manner, and erect in the J. cemetery, a granite monument, to be made from good Quincy granite, and to be of as good quality of granite as the monument of S. C., now standing in said cemetery," is an agreement not only as to the model or sample, as to form and size, but also as to the *quality of the granite*; and is a warranty, as to those particulars. (*Wells* agt. *Selwood*, 61 *Barb.*, 238.)

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6. In a case of warranty, the purchaser is not bound, as a matter of law, to return the goods, or to notify the vendor of the defects. (*Id.*)

7. In no case, where there is a simple warranty, has the vendee any right to return the goods; except when the right is reserved, in the contract. (*Id.*)

8. In case of a breach of warranty, the buyer may bring his action at once, founding it upon such breach, without returning the goods; but his continued possession of the goods, and their actual value, will be considered, in estimating the damages. (*Id.*)

9. Where the sale is of a specific article in possession of the vendor, the representation may amount to a warranty; but if it is merely to sell a quantity of any goods which are to be sound in quality, the remedy of the purchaser is to refuse to accept on delivery, or, if he discovers the defect afterwards, to rescind the contract and return the goods. (*Lawton* agt. *Keil*, 61 *Barb.*, 558.)

10. Where the vendor of corn had not the corn in his possession; but had purchased it from some other person as sound corn, and he so stated to the purchaser, adding, that he would sell it as such;

Held, that this was nothing more than a mere representation, and was not a warranty. (*Id.*)

11. That the purchaser, on discovering that the corn was damaged, could have refused acceptance; or, if he had no opportunity to examine it, before shipment, could have notified the party, before sale, and thereby protected himself from loss. (*Id.*)

See AGREEMENT. (61 *Barb.*)
DAMAGES. (*Id.*)

WATER AND WATERCOURSE.

See SPRINGS. (61 *Barb.*)
EVIDENCE. (*Id.*)

WILLS.

1. In constructing wills, the law favors a construction that will not tend to the disinheriting of heirs, unless the intention to do so is clearly expressed. That meaning is to be preferred which inclines to the side of the inheritance of the children of a deceased child. (*Scott* agt. *Guernsey*, 48 *N. Y.*, 106.)

2. The will of S, after a devise of cer-

tain premises to his daughter, P. G., during her life, contained the following clause: "Then to be divided amongst her now surviving children, or any of them that may be alive at her decease, or the heirs of any that may be dead at the time of executing this my last will."

Held, that the time referred to was the time the will takes effect, by vesting the estate in possession upon the death of P. G.; that the word "heirs" was used in the sense of children, and that the intent of the testator was that the children of P. G. should take, if living at her decease, or if any were then dead, leaving children surviving, that the children should take in place of the parent. (*Id.*)

See *Magaw* agt. *Field* (*Mem.*). (48 *N. Y.*, 668.)

3. The proponent of the will of an aged man, for probate, is not required to prove that the testator's mental faculties were those of a man in middle life, and of unimpaired physical powers. It is enough that he had sufficient mental capacity to fully comprehend the claims of his several children on his bounty, and to understand how to adjust and satisfy those claims. (*Reynolds* agt. *Root*, 62 *Barb.*, 250.)

4. To do this, the testator must know who have claims upon him, and the measure of those claims. To do this, he must understand fully what he has done, if anything, for each or either, and the peculiar claims of any upon his justice or generosity. (*Id.*)

5. Failure of memory being a natural attendant upon age, will not incapacitate an aged person from making a will. (*Id.*)

6. Where a subscribing witness to the execution of a will testified that she saw the deceased sign his name at the end of the paper; that he said he wanted her to sign her name to a paper and she did so; but did not hear him say that it was his last will and testament; that she signed it in his presence; *Held* that this testimony did not show that the statute had been complied with; but on the contrary, that the most important requirements were entirely disregarded. (*Trustees of the Auburn Theological Seminary* agt. *Calhoun*, 62 *Barb.*, 381.)

7. A witness testified that she heard a third person (S) say, at the time the testator signed the instrument, that it was the testator's last will and testament; whereupon the testator signed

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it, after saying to the witness "we want you to sign this." or, that he wanted her "to sign her name to a paper," but not calling it his will. That it was doubtful if the testator heard the remark of S that the paper was the testator's will, owing to deafness. There was no other publication of the will, or request to the witness, than the above. *Held* that this testimony fell very far short of establishing a legal execution of the will. (*Id.*)

8. If all the statute formalities are proved by one of the subscribing witnesses to a will to have been complied with, the will may be admitted to probate although the other subscribing witness fails to remember that such formalities were observed. (*Id.*)

9. But before this principle can apply, the surrogate must be satisfied that the witness professing to remember that the necessary formalities were observed, is truthful, and is telling the transaction precisely as it happened. If the witness undertakes to swear to the matters which the other witness swears never occurred, it is for the surrogate to say which he will believe. (*Id.*)

10. Although the proposition that while a man's intellect may not be so weak as to render him incapable of making a will, yet it may be in that feeble state that he readily and easily becomes the victim of the improper influences of such unprincipled and designing persons as see fit to practice on him, is doubtless correct, yet mere weakness of intellect does not prove undue influence. There must be some evidence of the influence, and of its improper exercise, to justify the rejection of a will on that ground. (*Reynolds agt. Root*, 62 Barb., 250.)

11. Direct evidence of undue influence is not necessary. It may be, and most frequently is, a legitimate inference from other facts and circumstances in the case. (*Id.*)

12. The unnatural exclusion, by a testator, of his only daughter, with whom he seems to have had no difficulty, to whom he had never given more than a very trifling pittance, and who was in need of aid from him, from a just and equal share of his estate, is a strong circumstance to show either mental incapacity, or undue influence. (*Id.*)

13. Where the circumstances under which a will was executed, and the condition, mental and physical, and his

situation in the family of the principal legatee, at the time, were such as to excite suspicion of undue influence; *Held* that before a will executed under these circumstances, which gave, substantially, all the property to one of several children, was admitted to probate, it was due to those cut off that the case should be thoroughly examined; and that a case was therefore presented which should be presented to a jury, upon issues framed for that purpose. (*Id.*)

14. Where a will was attended by the suspicious circumstances that it was made about the time the testator received his bounty money as an enlisted soldier; that the executor in the will was his guardian, and received such money; that the will was drawn in the office of the guardian, who was an attorney, by the clerk of the attorney; that his guardian was a legatee in the will; and that by its revocation the estate would go to the testator's next of kin; *Held* that probate of the will was properly revoked by the surrogate. (*Matter of Puig*, 62 Barb., 476.)

See EVIDENCE. (62 Barb.)

WITNESS. (*Id.*)

WITNESS.

1. A partner who has assigned all his interest in the copartnership to a copartner, is not a competent witness to prove such an agreement, in an action brought by the executors of a deceased partner, against the assignee, for an accounting, and to wind up the affairs of the copartnership. (*Lyon agt. Snyder*, 61 Barb., 172.)

2. Section 399 of the Code, which excludes every person through whom a party to an action derives "any interest, or title, by assignment, or otherwise," from being a witness against the executors of a deceased person, in regard to any personal transaction, or communication, between such witness and the deceased, must be construed to mean any interest, or title in, or to, the subject matter of the action. The assignor of any such title, or interest, is excluded from examination in the action. (*Id.*)

3. The prohibition is not limited to an examination in respect to those matters pertaining to the parts of the action assigned, but extends to the entire action. (*Id.*)

4. In an action by an executrix, upon a promissory note made by one of the

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- defendants and indorsed to the intestate by the others, the maker is an incompetent witness as between the defendant and the plaintiff, to prove that the note, at the time it was made, was infected with usury; or that the time of payment had been extended by an agreement between the testator, in his lifetime, and the witness, without the consent of the indorsers. (*Genet vgt. Lawyer, 61 Barb., 211.*)
5. And it makes no difference that the action was commenced by the testator in his lifetime, and at the time of the trial was continued in the name of his executrix. (*Id.*)
6. Where an action is commenced upon a promissory note, against the maker and indorsers, by the service, upon all, of a summons in which all are named, the maker is clearly a party to the action. The fact that he does not appear, nor put in an answer, but suffers default, does not operate to sever the action, or to discontinue it as to him. And being a party, he is an incompetent witness against the plaintiff suing as executrix, in respect to transactions between him and the testator. (*Id.*)
7. Nor will a release, executed by the indorsers, to the maker, of his liability to them upon the note, affect the question of his competency as a witness against the plaintiff. The defendants cannot, by any act of their own, change the statute, or take away the rights of the plaintiff under it. (*Id.*)
8. In an action brought by an heir, against the other heirs, and the executors of the testator, for a distribution of the personal estate and a partition of the real estate, of the testator, the defendants offered to prove by one of the heirs who was a defendant, that he overheard a conversation, one new-year's day, in which the testator said to a third person, "I have this morning made each of my sons a present of a house and lot, as a new-year's present." The offer was rejected, on the ground that the witness was incompetent to prove the declarations of the deceased.
- Held*, that the witness was competent to testify to what the defendants offered to prove by him; for the reason that the offer was not to have him testify 'in regard to any personal transaction or communication between such witness,' and the deceased, within the prohibition of the Code. (§ 399.) (*Sanford vgt. Sanford, 61 Barb., 293.*)
9. But, that the evidence offered was hearsay, and it would not, if it had been received, have tended to establish that the houses and lots were not advancements. (*Id.*)
10. That they were advancements, though they were presents or gifts; and hence the ruling of the referee, if incorrect, was immaterial, and did no harm to the defendants. (*Id.*)
11. After a letter, written by a witness, in which an admission was made, had been proved by the witness, on his direct examination by the plaintiff's counsel, and matters touching the letter had been proved by such counsel, which it would have been difficult, if not impossible, to prove by any other witness;
- Held*, that having proved such admission by the witness, the latter had the right, (being a defendant in the action,) to explain, on his cross-examination, the admission, though it was in writing, and to entirely do away with its effect against him. (*Id.*)
- See INTENTION.* (61 Barb.)
12. It was the intention of the legislature, by the act of 1860 amending section 399 of the Code, to make husband and wife competent witnesses, the one for or against the other, in all cases where they were parties to the action. (*Matteson vgt. The New York Central Railroad Co., 62 Barb., 364.*)
13. Upon an application to the surrogate, to revoke the probate of a will, on the ground of the incapacity of the testator by reason of his being under the age of 18 when the will was executed, the mother of the testator is a competent witness to prove the time of his birth. (*Matter of Paige, 62 Barb., 476.*)
14. When it appears, upon a trial, that a witness then examined has sworn differently upon the same point, on a former occasion, he is not to be pronounced by the judge to be incompetent and his testimony excluded from consideration by the jury; but his testimony should be submitted to the jury, to be considered by them, in connection with the other evidence, under proper instructions. (*Warren vgt. Haight, 62 Barb., 490.*)
15. The decision to the contrary in *Dunlop vgt. Patterson*, (5 Cowen, 243,) questioned, and declared to be at best, ambiguous; and, although qualified by *The People vgt. Evans*, (40 N. Y., 5, 6,) the authority of the latter case *held*

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- to have been entirely destroyed by the case of *Dunn* agt. *The People*, (29 N. Y., 526, 528.) (*Id.*)
16. It is a rule that a witness is competent until a judgment for felony is introduced against him; and that the question of credibility is entirely for the jury, under proper instructions from the court. (*Id.*)
17. A witness testified to statements made by the defendant tending to support the plaintiffs' claim, and, upon cross-examination, that he had not informed the plaintiffs' attorney of the statements; *Held*, that it was competent, on re-direct examination, to call his attention to a particular time and place and persons then present, for the purpose of allowing him to correct his testimony in regard to his not informing the plaintiffs' attorney. (*Gilbert* agt. *Sage*, 5 *Lansing*, 281.)
18. Where an attempt was made to impeach the testimony of a witness for the plaintiffs; *Held*, that it was competent to inquire of the witness whether he had not been on friendly terms with the plaintiffs. (*Id.*)
19. To lay a foundation for his impeachment, it is competent to inquire of him whether he has not made statements inconsistent with his testimony, and to show, by other witnesses, that he has made such statements. (*Id.*)
20. A prisoner is a competent witness on his own behalf, under chapter 678 of the laws of 1869, even although he has been sentenced upon a conviction for felony, and is unpardoned. (*Delamater* agt. *The People*, 5 *Lansing*, 332.)
- See CANAL CONTRACTOR. (5 *Lansing*.)
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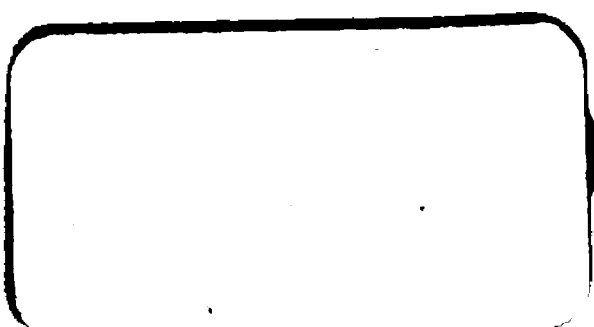
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